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Supreme Court of the United States

OCTOBER TERM, 1961

No. 604 41

A. L. MEHLING BARGE LINES INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI

FILED JANUARY 21, 1961
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 667

**A. L. MECHLING BARGE LINES INC., ET AL.,
APPELLANTS,**

vs.

UNITED STATES, ET AL.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI**

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Original Print

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

Civil Action No. 59 C 335(3)

**CARGILL, INCORPORATED, a corporation, A. L. MECHLING
BARGE LINES INC., a corporation, MISSISSIPPI VALLEY
BARGE LINE COMPANY, a corporation, THE OHIO RIVER
COMPANY, a corporation, and BLASKE, INC., a corporation,
Plaintiffs,**

vs.

**UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants.**

COMPLAINT—Filed November 16, 1959

1. This action is brought under the provisions of 28 U.S.C., §§ 1336, 1398, 2284 and 2321-2325, and 5 U.S.C. § 1009, inclusive, to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission, hereinafter called the Commission, entitled Fourth Section Order No. 19059, Grain and Grain Products from Illinois to the East, made and entered by the Commission, Division 2, on January 9, 1959, as amended by Supplemental Fourth Section Order No. 19059, entered July 17, 1959, Second Supplemental Fourth Section Order No. 19059, entered August 7, 1959, and Third Supplemental Fourth Section Order No. 19059, entered September 10, 1959, copies of which are attached hereto as Exhibits 1, 2, 3, and 4, respectively, and made a part hereof, and also under the provisions of 28 U.S.C., § 2201 and 5 U.S.C., § 1009 for a declaratory judgment to settle important questions relating to the power of the Commission to relieve carriers from the long-[fol. 2] and-short-haul provision of section 4 of the Interstate Commerce Act, 49 U.S.C. § 4, hereinafter called the Act.

2. Plaintiff, Cargill, Incorporated, hereinafter called Cargill, is a corporation organized under the laws of the

State of Delaware, having its principal place of business at Minneapolis, Minnesota. It is engaged in buying, selling, storing, handling and processing corn, oats, soybeans, and other agricultural commodities. It operates a large terminal grain elevator at Chicago, Illinois, into which it draws corn, oats, and soybeans and other agricultural commodities from the grain-producing territory of the Midwest, including the territory in Northern Illinois here involved, sometimes referred to herein as the origin territory, and from which it reships such commodities by railroad, barge, truck and lake steamer to millers, processors and consumers. It also operates what are known as sub-terminal elevators located on the Illinois Waterway at Lockport, Morris, Ottawa and Spring Valley, Illinois, which purchase grain from nearby country elevators in the origin territory here involved, primarily for shipment to its terminal elevator at Chicago.

3. Plaintiff, A. L. Mechling Barge Lines Inc., hereinafter called Mechling, is a corporation organized under the laws of the State of Delaware, having its principal place of business at Joliet, Illinois. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act, 49 U.S.C. § 901 ff.

4. Plaintiff, Mississippi Valley Barge Line Company, hereinafter called Valley, is a corporation organized under the laws of the State of Delaware, having its principal [fol. 3] place of business at St. Louis, Missouri. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act.

5. Plaintiff, The Ohio River Company, hereinafter called Ohio River, is a corporation organized under the laws of the State of West Virginia, having its principal place of business at Cincinnati, Ohio. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act.

6. Plaintiff, Blaske, Inc., hereinafter called Blaske, is a corporation organized under the laws of the State of Delaware, having its principal place of business at Jeffersonville, Indiana. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act.

7. Plaintiffs Mechling, Valley, Ohio River, and Blaske are, and have been, engaged, among other things, in the transportation of corn, oats, soybeans, and other grain from all ports on the Illinois Waterway between Lockport and Lacon, Illinois, to Chicago, Illinois, with respect to which traffic they are competing carriers of the railroads here involved. They are members of the Waterways Freight Bureau, an association of common-carrier barge lines, whose articles of organization have been approved by the Commission under Section 5a of the Act, 49 U.S.C. § 5b. Through their said agent, Waterways Freight Bureau, they protested the rates here involved and the granting of fourth-[fol. 4] section relief in connection therewith. In addition, plaintiff Mechling filed an individual protest against the rates and the granting of fourth-section relief.

8. Prior to January 10, 1959, the railroads serving the Northern Illinois grain-producing area, hereinafter called the Western Railroads, had in effect certain reduced rates from such origins to Chicago on corn, oats, soybeans and the products thereof, which rates were allegedly published to meet truck and barge competition on such traffic. The railroads operating east of Chicago, hereinafter called the Eastern Railroads, also had in effect from Chicago to destinations generally east of Chicago, in what are known as Central, Trunk Line, and New England territories, herein collectively referred to as the East, proportional or reshipping rates on corn, oats, soybeans and the products thereof, applicable on such commodities originating west of Chicago. The proportional or reshipping rates from Chicago to the East could be combined with the rates from the Northern Illinois origins into Chicago to form through combination rates from origins in Northern Illinois to destinations in the East. In order to avoid violations of the long-and-short-

haul provision of section 4 of the Act, the formation of such through combination rates, was subject, among other restrictions, to the restriction that the through combination could not be lower than the local rate from Chicago to the involved destination. Subject to that restriction, the grain involved could be shipped out of Chicago to the East on proportional rates from Chicago which were lower than the so-called local or flat rates from Chicago, which would apply on grain originating at Chicago, to the same destinations.

9. On or about December 4, 1958, the Eastern and Western Railroads published, in accordance with the pro-[fol. 5] visions of the Interstate Commerce Act, and filed with the Interstate Commerce Commission, certain tariffs known as Supplement 125 to TEA-ER, Agent, Tariff 245-H, ICC 4403 (Hinsch series); Supplement 59 to TEA-ER, Agent, Tariff 535-C, ICC 4499 (Hinsch series); and Supplement 31 to WTL-C, Agent, Tariff 68-R, ICC A-4069 (Prueter series). These tariffs, which were published to become effective January 10, 1959, among other things, waived the requirement that the through combination rates must be no lower than the local rates from Chicago to the involved destinations, and substituted therefor the requirement that the minimum inbound rate must be 12 cents per 100 pounds. The effect of such a provision was to permit the application of combination rates from origin to final destination which were lower than the local or flat rates from Chicago to the same destination. Since such rates would be in violation of the long-and-short-haul provision of section 4 of the Act, the tariffs referred to could not lawfully be made effective unless the Commission granted relief from the long-and-short-haul provision of section 4 of the Act, which reads in pertinent part as follows:

(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, . . . *Provided,*

That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence:

[fol. 6] 10. On or about December 4, 1958, the rail carriers parties to the aforesaid tariffs, through their Agent, H. R. Hinsch, also filed with the Commission an application for relief from the provisions of section 4 of the Act. This application was docketed by the Commission as Fourth Section Application No. 35140, Corn and Corn Products from Illinois to the East. On or about December 26, 1958, plaintiff Cargill filed with the Commission a protest against the proposed tariffs and a petition for suspension thereof and a protest against the granting of any fourth-section relief in connection therewith. On or about December 24, 1958, a similar protest and petition for suspension was filed by plaintiff Mechling and on or about December 23, 1958, a similar protest and petition for suspension was filed by Waterways Freight Bureau. In all these protests and petitions for suspension it was alleged, and supported with pertinent factual data, that the rates proposed by the rail carriers were lower than necessary to meet the alleged water competition and that such rates threatened the extinction of legitimate competition by water. Such allegations, if sustained, would require the denial of the relief sought since, in order to grant such relief, the Commission is required to find that the rates proposed would be "reasonably compensatory" and such term has, through long-established administrative practice, been given the meaning

set forth by the Commission in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, as follows:

In the light of these and similar considerations, we are of opinion and find that in the administration of the fourth section the words "reasonably compensatory" imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of [fol. 7] carrier property generally, as contemplated in section 15a of the act.

A reply to these protests was filed by the railroads.

11. On January 9, 1959, Division 2 of the Commission voted not to suspend the proposed rates but entered an order instituting an investigation into the lawfulness thereof in Docket No. 32790. Corn, Oats, Soybeans—Illinois to the East, a copy of which order is attached hereto as Exhibit 5, and made a part hereof. That order read in part as follows:

It appearing, That, upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and

issued hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

• • • • •
And it is further ordered. That this matter be assigned for hearing at a time and place to be hereafter fixed.

12. Also on January 9, 1959, the Commission, by Division 2, entered the order herein complained of, Fourth Section Order No. 19059, Exhibit 1 hereto, authorizing the railroads to establish the rates sought without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act "until the effective date of the further order to be entered after hearing in fourth-section application No. 35140, as amended".

13. On or about January 28, 1959, Cargill, Mechling, [fol. 8] and the Waterways Freight Bureau filed with the Commission their petitions for reconsideration and vacation of Fourth Section Order No. 19059, entered by Division 2 on January 9, 1959. The railroads filed with the Commission a reply to the said petitions, and, by order dated March 10, 1959, the Commission by Division 2, denied the aforesaid petitions for reconsideration and vacation. A copy of this order is attached hereto as Exhibit 6 and made a part hereof.

14. The proceedings in Docket No. 32790 and Fourth Section Application No. 35140 were finally heard at Chicago, Illinois, before an Examiner of the Commission, commencing July 7, 1959, and ending July 16, 1959.

15. On or about September 1, 1959, the railroad respondents and applicants in Docket No. 32790 and Fourth Section Application No. 35140 filed with the Commission a petition for further hearing in said proceedings and for consolidation with said proceedings of Fourth Section Applications No. 35507 and No. 35623.

Fourth Section Application No. 35507, which had been filed on or about June 15, 1959, was an application by the

railroads for relief from the long-and-short-haul provision of section 4 of the Act in connection with rates on corn, oats and soybeans to Chicago, Illinois, on traffic destined to the East from territory (including the so-called Kankakee Belt line of the New York Central Railroad) lying generally to the south of the origin territory involved in Fourth Section Application No. 35140. The applicants in that application had requested that the proceeding be assigned for hearing on July 7, 1959, along with the hearing in Fourth Section Application No. 35140. However, the rates sought to be established were published to become effective July 18, 1959. Cargill, Mechling, and Waterways Freight Bureau [fol. 9] filed protests against such rates and the granting of fourth-section relief in connection therewith but agreed that the hearing in connection therewith might be held on July 7, 1959, on the same record as the hearing on Fourth Section Application No. 35140. The Commission did not assign the proceeding for hearing at that time, nor has the proceeding yet been assigned for hearing. The Commission permitted the proposed rates to become effective July 18, 1959, but entered an order instituting an investigation into their lawfulness in Docket No. 33132, a copy of which is attached hereto as Exhibit 7, and made a part hereof. By Supplemental Fourth Section Order No. 19059, dated July 17, 1959, (Exhibit 2), the Commission, by Division 2, granted temporary fourth-section relief as sought in Fourth Section Application No. 35507.

Fourth Section Application No. 35623, Grain and Grain Products from Illinois to East, filed on or about August 8, 1959, was an application by the New York Central Railroad for relief from the long-and-short-haul provision of section 4 of the Act from certain points previously named in Fourth Section Application No. 35507. Fourth Section Application No. 35623 was necessitated by the fact that Fourth Section Application No. 35507 had erroneously requested relief for the wrong rates insofar as the New York Central Railroad was concerned. Such rates, and the granting of fourth-section relief in connection therewith, were protested by Cargill, Mechling, and Waterways Freight Bureau but the Commission allowed them to become effective September 15, 1959, and in connection therewith granted temporary fourth-

section relief in Third Supplemental Fourth Section Order No. 19059, entered September 10, 1959. (Exhibit 4). The rates involved are embraced within the investigation in No. 33132.

[fol. 10] Prior to the filing of Fourth Section Application No. 35623, the railroads had also filed Fourth Section Application No. 35559, Grain and Grain Products From Illinois to the East, in which they sought relief from the long-and-short-haul provision of section 4 of the Act with respect to the rates on corn, oats and soybeans from additional territory in Northern Illinois and in Wisconsin to Chicago, Illinois, and Milwaukee, Wisconsin, for further movement to the East. The proposed rates were permitted by the Commission to become effective on August 8, 1959, as published, subject to temporary fourth-section relief granted by Second Supplemental Fourth Section Order No. 19059, dated August 7, 1959, (Exhibit 3). The Commission also instituted an investigation into the lawfulness of said rates by its First Supplemental Order No. 33132, Grain and Soybeans—Illinois to the East, a copy of which is attached hereto as Exhibit 8, and made a part hereof.

Replies opposing the further hearing requested by the railroads in No. 32790 and Fourth Section Application No. 35140 and consolidation with those proceedings of Fourth Section Applications No. 35507 and No. 35623 were filed by Cargill, Mechling, and Waterways Freight Bureau. Before the Commission had acted on the petition, the railroad respondents and applicants filed a supplementary petition for further hearing in No. 32790 and Fourth Section Application No. 35140, in which they sought the opportunity to introduce evidence relating to the barge movements of corn to Chicago for the months of July and August, 1959, although the hearing in the proceeding had just concluded on July 16, 1959. Replies opposing the further hearing and protesting against the unreasonable delay which the further hearing and consolidation would necessarily cause were filed by Cargill, Mechling and Waterways Freight [fol. 11] Bureau. However, by order dated October 28, 1959, released to the parties and the public on November 4, 1959, the Commission, by Division 2, reopened No. 32790 and Fourth Section Application No. 35140 for further hear-

ing and also ordered that No. 33132 and Fourth Section Applications Nos. 35507, 35623, and 35559 be consolidated with No. 32790 and Fourth Section Application No. 35140 for hearing. A copy of said order is attached hereto as Exhibit 9, and made a part hereof. No date for the further hearing has yet been set.

16. Although Fourth Section Application No. 35140 was filed on or about December 4, 1958, and the rates in connection with which fourth-section relief was sought became effective January 10, 1959, the hearing in the proceeding was not concluded until July 16, 1959, and briefs had not yet been filed when the Commission, by its order of October 28, 1959, reopened the proceeding for further hearing. Thus, the railroads have already been able to maintain for ten months the rates which plaintiffs allege are unlawful. If Fourth Section Application No. 35140 had not been reopened for further hearing, under the normal Commission procedure, it would have been in excess of one more year before the proceedings would have been determined by the Commission. The reopening of Fourth Section Application No. 35140 will add to that time several additional months, during all of which the railroads will be able to maintain the rates alleged to be unlawful, unless the operation of Fourth Section Order No. 19059, as amended, is enjoined by the Court.

17. The effect of the rates maintained by the railroads pursuant to Fourth Section Order No. 19059, as amended, has been and will continue to be, to deprive plaintiff Cargill and the plaintiff water carriers, Mechling, Valley, Ohio River, and Blaske, of business to Chicago which they would [fol. 12] normally handle if the Commission had not unlawfully permitted the railroads to establish such rates, diverting such business to competitors of plaintiffs and causing plaintiffs substantial and irreparable injury.

18. The Commission's Fourth Section Order No. 19059, dated January 9, 1959, as amended (Exhibits 1, 2, 3 and 4 hereto), is void and unlawful for the following reasons:

(1) The order is not supported by adequate findings and does not show on its face sufficient basis for its

issuance; and more particularly it does not contain findings to show that the facts relied on by the railroads constitute a "special case," that the order was entered "after investigation", or that the rates which it authorizes are "reasonably compensatory" for the service performed, as that term has been defined through long and well-established administrative practice.

(2) The Commission is without power and authority to enter an order granting "temporary" fourth-section relief in said proceeding prior to completion of its investigation and hearing.

(3) The order was entered by the Commission without giving plaintiffs an opportunity to be heard and to present evidence in support of their protests in a matter vitally affecting their business interests and without conducting a hearing to determine the correctness of the allegations made in the various applications, petitions, and protests filed in said proceedings.

(4) The order deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(5) The order is capricious, arbitrary, erroneous and beyond the power of the Commission.

[fol. 13]: 19. Although the weight of authority in cases decided by Three-Judge District Courts is now clearly to the effect that orders granting relief from the long-and-short-haul provision of section 4 of the Act must be supported by findings to show a sufficient basis for issuance of the order, the Commission, as here, still follows the practice of entering such orders without supporting findings. It is of substantial importance to these plaintiffs as well as to many other competing carriers and shippers who find themselves in similar positions, and who wish to avoid lengthy and expensive litigation, that the absence of any power and authority in the Commission to enter temporary fourth-section orders prior to a hearing, and to enter them without supporting findings, be definitely established. It is

possible that the entry of a final order in Fourth Section Application No. 35140 may make this case moot before a final determination of these issues by the Supreme Court of the United States can be obtained, just as other cases in which similar relief has been sought have become moot before the issues could be determined by the Supreme Court. Therefore, it is important to the proper administration of the Act that the Court, in addition to passing upon the legality of the particular Commission action here under review, enter a declaratory judgment defining the rights, powers, and duties of the Commission in entering so called temporary orders granting relief from the long-and-short-haul provision of section 4 of the Act prior to a hearing, and in entering such orders without supporting findings.

20. By reason of the unlawful, arbitrary and capricious action of the Commission in entering its Fourth Section Order No. 19059, dated January 9, 1959, as amended, plaintiffs have been and will continue to be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

[fol. 14] Wherefore, plaintiffs pray:

1. That, pursuant to 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, there shall be constituted to hear this case a special court of three judges, at least one of whom shall be a circuit judge;
2. That the Court, by interlocutory injunction, enjoin and restrain the operation of Fourth Section Order No. 19059, as amended, (Exhibits 1, 2, 3 and 4) pending final hearing and determination of this suit;
3. That, upon final hearing of this cause, the Court adjudge that Fourth Section Order No. 19059, dated January 9, 1959, as amended, (Exhibits 1, 2, 3 and 4), is unlawful, void, beyond the power of the Commission, arbitrary, capricious and unsupported by essential findings, and that a judgment be entered setting aside, annuling, suspending and perpetually enjoining the operation of said order;

4. That the Court, pursuant to the provisions of 28 U.S.C. § 2201 and 5 U.S.C. § 1009 enter a declaratory judgment upon the following questions of law:

(1) May the Interstate Commerce Commission enter an order granting relief from the long-and-short-haul provision of section 4 of the Interstate Commerce Act, 49 U.S.C. § 4, which order does not contain findings which disclose on the face of the order a basis for its issuance sufficient to comply with the requirements of section 4 of the Act.

(2) May the Commission, concurrently with the entry of an order instituting an investigation into the lawfulness of rates which would be in violation of section 4 of the Act unless the Commission authorizes such fourth-section departures, and prior to the hearing therein ordered, also enter, over the protests of injured [fol. 15] competing carriers and shippers, a so-called temporary order, granting relief from the long-and-short-haul provision of section 4 of the Act, to be effective until the effective date of a further order to be entered by the Commission after the hearing?

5. That plaintiffs have such other and further relief as may be deemed proper by the Court.

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Lord, Bissell & Brook, 135 S. LaSalle Street, Chicago 3, Illinois, Of Counsel.

[fol. 16]

EXHIBIT 1 TO COMPLAINT

Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 9th day of January, A. D. 1959

**GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST**

Upon consideration of the matters and things involved in fourth-section application No. 35140, as amended, filed by the Traffic Executive Association—Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 (Hinsch series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates herein-after described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, which application, as amended, is hereby referred to and made a part hereof:

It is ordered, That, effective January 10, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35140, as amended, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their

products, in carloads, as described in the application, from points in northern Illinois named in Appendix "C" of the application to points in central, trunk-line, and New England territories, rates constructed on the basis described in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Division 2.

HAROLD D. MCCOV,
Secretary.

(SEAL)

[fol. 17]

EXHIBIT 2 TO COMPLAINT

Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 17th day of July, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35507, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff L.C.C. 4403 (Hinseh series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consid-

eration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, which applications and order are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered as aforesaid, be, and it is hereby, modified and amended by adding thereto the following paragraph:

It is further ordered, That, effective July 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35507, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, and soybeans, and their products, in carloads, as more fully described in the application, from points in northern Illinois to points in central, trunk-line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2,

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 18]

EXHIBIT 3 TO COMPLAINT

Second Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its office in Washington, D.C., on the 7th day of August, A.D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

(From Wisconsin)

Upon consideration of the matters and things involved in fourth-section application No. 35559, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental order No. 19059, entered July 17, 1959, in application No. 35507, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered. That fourth-section order No. 19059, entered, modified, and amended as aforesaid, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered. That, effective August 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35559, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in carloads, as more fully described in the application, to points in central, trunk

line, and New England territories, from (A) points in Illinois and Wisconsin, when routed by way of Chicago, Ill., or points in the Chicago switching district, Keweenaw, and Milwaukee, Wis., or Milwaukee terminal stations, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. MCCOY,
Secretary.

(Seal)

[fol. 19]

EXHIBIT 4 TO COMPLAINT

Third Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its office in Washington, D.C., on the 10th day of September, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35623, filed by The New York Central Railroad Company for itself and on behalf of carriers parties to its tariff I.C.C. 1169, according as they may participate in the traffic, for authority to establish and

maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered, modified, and amended as aforesaid, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, effective September 15, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35623, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in carloads, as more fully described in the application, from points in Illinois on The New York Central Railroad Company to points in central, trunk line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. MCCOV,
Secretary.

(SEAL)

[fol. 20]

EXHIBIT 5 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 9th day of January, A. D. 1959.

No. 32790

CORN, OATS, SOYBEANS—ILLINOIS TO THE EAST

There being under consideration the matter of rates and charges, and the rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of corn, oats, soybeans, and their products, in carloads, from certain points in northern Illinois to official territory points east of Chicago, as set forth in the following:

Traffic Executive Association-Eastern Railroads, Agent:

SUPPLEMENT 125 to I.C.C. 4403 (Hinsch Series),
On pages 4, 5, and 6 thereof, Note 20, Items 278-P and 281;

Western Trunk Line Committee, Agent:

SUPPLEMENT 31 TO I.C.C. A-4069,
On pages 7 and 8 thereof, Items 125-G and 126;

JOINT TARIFF:

Traffic Executive Association-Eastern Railroads, Agent:

I.C.C. 4499 (Hinsch Series),

Western Trunk Line Committee, Agent,

I.C.C. A-3941,

SUPPLEMENT 59 thereto, on pages 4, 5, 6, 7, and 8 thereof, Note 45, Items 536 and 537,

SUPPLEMENT 60 thereto, on page 2 thereof,
Item 536-A;

or as same may be amended or reissued;

It appearing; That, upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to the schedules named herein be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that a notice of this proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

[fol. 21] *And it is further ordered*, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Division 2.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 22]

EXHIBIT 6 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 10th day of March, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon further consideration of the matters and things involved in fourth-section application No. 35140, as amended, and upon consideration of petitions dated January 26, 1959, and January 27, 1959, filed by Mechling Barge Lines, Inc., and Cargill, Incorporated, respectively, for reconsideration of application No. 35140, as amended, and vacation of fourth-section order No. 19059, entered therein, which application as amended, petitions, and order are hereby referred to and made a part hereof, and it appearing that the matters and things submitted in the petitions do not justify the vacation sought:

It is ordered, That the petitions of January 26, 1959, and January 27, 1959, be, and they are hereby, denied.

By the Commission, Division 2.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 23]

EXHIBIT 7 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 17th day of July, A. D. 1959.

No. 33132

GRAIN AND SOYBEANS—ILLINOIS TO THE EAST

There being under consideration the matter of rates and charges, and the rules, regulations and practices affecting

such rates and charges, applicable on interstate or foreign commerce of corn, oats, soybeans, and their products, in carloads, from certain points in northern Illinois to official territory points east of Chicago, Ill., as set forth in the following:

Traffic Executive Association-Eastern Railroads, Agent:

SUPPLEMENT 136 To I.C.C. 4403 (Hinsch series),
On page 2 thereof, in Item 278-Q, the STATIONS preceded by the "tear drop" reduction symbol.

SUPPLEMENT 137 To I.C.C. 4403 (Hinsch series),
On page 2 thereof, in Item 281-B, the STATIONS preceded by the "tear drop" reduction symbol.

Western Trunk Line Committee, Agent:

SUPPLEMENT 36 TO I.C.C. A-4069,
On page 3 thereof, in Item 125-H, the stations preceded by the "tear drop" reduction symbol and the stations where the "tear drop" reduction symbol precedes the carriers name.

SUPPLEMENT 37 TO I.C.C. A-4069,
On pages 2 and 3 in ITEM 126-B, the stations preceded by the "tear drop" reduction symbol and the stations where the "tear drop" reduction symbol precedes the carriers name.

JOINT TARIFF:

Traffic Executive Association-Eastern Railroads, Agent:

I.C.C. 4499 (Hinsch series)

Western Trunk Line Committee, Agent,

I.C.C. A-3941,

SUPPLEMENT 65 thereto, on page 2 thereof, in Item 536-C, the STATIONS preceded by the "tear drop" reduction symbol.

SUPPLEMENT 67 thereto, on page 2 thereof, in Item 537-C, the STATIONS preceded by the "tear drop" reduction symbol.

or as same may be amended or reissued;

It appearing, That, upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

[fol. 24] *It is further ordered*, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to the schedules named herein be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that a notice of this proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

And it is further ordered, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Division 2.

HAROLD D. McCoy,
Secretary.

(SEAL)

[fol. 25]

EXHIBIT 8 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D.C., on the 14th day of August, A. D. 1959.

No. 33132

FIRST SUPPLEMENTAL ORDER

GRAIN AND SOYBEANS—ILLINOIS TO THE EAST

In the original order in this proceeding, the Commission, Division 2, entered upon an investigation concerning certain rates and charges, and the rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of corn, oats, sorghum grains and soybeans, and products thereof, in carloads, from points in northern Illinois to points in official territory east of Chicago, Ill., as set forth in schedules designated therein;

It appearing, That the following schedules contain rates and charges, rules, regulations and practices which are similar to those covered by the original order in this proceeding:

Traffic Executive Association-Eastern Railroads, Agent:

SUPPLEMENT 138 TO I.C.C. 4403 (Hinsch series),
On page 8 thereof, in Item 281-C, all matter preceded
by the "tear drop" reduction symbol.

SUPPLEMENT 140 TO I.C.C. 4403 (Hinsch series)
On pages 2 and 3 thereof, in Item 278-S, all matter
preceded by the "tear drop" reduction symbol.

SUPPLEMENT 1 TO I.C.C. C-64,
On pages 3 and 4 thereof, ITEMS 260 and 265;

Western Trunk Line Committee, Agent:

SUPPLEMENT 38 TO I.C.C. A-4069,

On pages 2 and 3 thereof, in Items 125-I and 126-C, the point Milwaukee, Wis., preceded by the "tear drop" reduction symbol.

JOINT TARIFF:

Traffic Executive Association-Eastern Railroads, Agent:
I.C.C. 4499 (Hinsch series)

Western Trunk Line Committee, AGENT,
I.C.C. A-3941,

In **SUPPLEMENT 68**, on pages 2 and 3 thereof, in Items 536-D and 537-D, all matter preceded by the "tear drop" reduction symbol;

It further appearing, That upon consideration of the tariff schedules shown in the foregoing, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That this investigation be, and it is hereby broadened, upon the Commission's own motion, into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in schedules designated herein, or as the same may be amended or reissued, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

[fol. 26] *It is further ordered*, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to the schedules named herein be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that a notice of this

proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

And it is further ordered, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Board of Suspension.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 27]

EXHIBIT 9 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 28th day of October, A. D. 1959.

No. 32790

CORN, OATS, SOYBEANS—ILLINOIS TO THE EAST
FOURTH SECTION APPLICATION No. 35140
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

No. 33132

GRAIN AND SOYBEANS—ILLINOIS TO THE EAST
FOURTH SECTION APPLICATION No. 35507
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

FOURTH SECTION APPLICATION No. 35623
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

FOURTH SECTION APPLICATION No. 35559
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

Upon consideration of the records in the above-entitled proceedings, of a petition, dated September 1, 1959, and

supplemental petition, dated September 18, 1959, filed by the applicants and respondents for further hearing in Docket No. 32790 and Fourth Section Application No. 35140 and consolidation therewith of Fourth Section Applications Nos. 35507 and 35623, and of the replies thereto filed by Cargill, Incorporated, A. L. Mechling Barge Lines, Inc., Waterways Freight Bureau, and Peoria Board of Trade, and good cause appearing:

It is ordered, That No. 32790 and F. S. A. 35140 be, and the same are hereby, reopened for further hearing.

It is further ordered, That No. 33132, F. S. A. 35507, F. S. A. 35623, and F. S. A. 35559 be, and the same are hereby, consolidated with No. 32790 and F. S. A. 35140 for hearing.

By the Commission, Division 2.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 29]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION—Filed January 18, 1960

Now come the United States of America and the Interstate Commerce Commission, defendants, and, in answer to the complaint, state:

First Defense

The complaint fails to state a cause of action.

Second Defense

Plaintiffs may not maintain this suit for failure to exhaust their administrative remedies.

Third Defense

Plaintiffs cannot maintain this suit for lack of standing.

[fol. 30]

Fourth Defense

That the complaint be dismissed with respect to the request for a declaratory judgment for the reason that the Court does not have jurisdiction to grant relief by way of declaratory judgment against the defendants.

Fifth Defense

Further answering the complaint but without waiver of their defenses hereinabove, the defendants answer and say:

I.

Answering paragraph 1, defendants admit that this action is brought purportedly pursuant to the statutes mentioned therein, except that the defendants aver that these statutes do not confer upon the Court jurisdiction to review interlocutory orders of the Commission or to grant the relief sought by way of declaratory judgment.

II.

Admit the allegations contained in paragraphs 2, 3, 4, 5 and 6, except that defendants allege that the plaintiffs named in paragraphs 4, 5 and 6 did not participate in the proceedings before the Commission.

III.

Answering paragraph 7, defendants admit that the rate-making agreement of Waterways Freight Bureau has been approved by the Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b, that it protested the rates filed by the rail carriers and the Commission's grant of temporary relief from the long and short-haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. Section 4, pending hearing; and admit the filing of a protest with the Commission by plaintiff Mechling against [fol. 31] the rates and the granting of fourth section relief.

Defendants neither admit nor deny the remaining allegations contained in this paragraph for lack of knowledge and information.

IV.

Answering paragraph 8, the Commission has as yet made no findings with respect to these allegations, and for lack of knowledge defendants neither admit nor deny the allegations.

V.

Answering paragraph 9, defendants admit the allegations contained therein.

VI.

Answering paragraph 10, admit the allegations to the effect that the rail carriers, on or about December 4, 1958, filed an application for fourth section relief which was docketed by the Commission as described therein, admit the filing of the designated pleadings by the named plaintiffs and the rail carriers, except that defendants aver that the remaining allegations of this paragraph are argumentative in nature to which no answer is required.

VII.

Admit the allegations of paragraphs 11, 12, 13 and 14, except that defendants aver that the hearing before a Commission examiner, as stated in paragraph 14, did not constitute a final hearing foreclosing the possibility of reopening for further hearing.

VIII.

Answering the allegations of paragraph 15, defendants admit filing of the designated pleadings and fourth section applications with the Commission, except that defendants [fol. 32] respectfully refer the Court to the fourth section applications Nos. 35507, 35623 and 35559 for a complete and accurate statement of the matters contained therein; admit the entry of the designated orders of the Commission. Defendants aver that the Commission has set the matter

down for further hearing before an examiner at Chicago, Illinois, on February 1, 1960.

IX.

Answering paragraph 16, defendants aver that the allegations contained therein are argumentative in nature and require no answer.

X.

Answering paragraph 17, defendants deny that the Commission unlawfully permitted the establishment of the challenged rates. Defendants aver that the action of the Commission is valid and lawful in all respects. Defendants further aver that any injuries which may have occurred or will occur to plaintiffs as a result of the lawful and valid action of the Commission do not constitute any legal basis for instituting or maintaining this suit.

XI.

Deny that the designated orders of the Commission are void and unlawful for the reasons specified in paragraph 18 or for any reasons whatsoever.

XII.

Answering the allegations of paragraph 19, the defendants aver that they are argumentative in nature and do not require an answer, and in any case do not afford a basis for the granting of a declaratory judgment. The defendants further aver that the Court is without jurisdiction to render a declaratory judgment.

[fol. 33]

XIII.

Answering paragraph 20, defendants deny that the action of the Commission in entering its fourth section order No. 19059, dated January 9, 1959, as amended, is unlawful, arbitrary and capricious. Defendants aver that fourth section order No. 19059, as amended, and any and all other orders of the Commission entered in this proceeding are lawful and valid in all respects and that any injuries which may occur to the plaintiffs resulting from the lawful and

valid orders of the Commission do not constitute any legal basis for instituting or maintaining this cause. Further answering the complaint, defendants aver that plaintiffs have not shown any legal damage to require the issuance of an interlocutory injunction pending determination by this Court of this suit.

Wherefore, the United States of America and the Interstate Commerce Commission pray that the relief sought in the complaint against the United States and the Interstate Commerce Commission be denied, and that the complaint be dismissed against these defendants, plaintiffs to pay the costs.

Robert W. Ginnane, General Counsel; H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Robert A. Bicks, Acting Assistant Attorney General; Harry Richards, United States Attorney, St. Louis, Missouri; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

[fol. 34] **CERTIFICATE OF SERVICE** (omitted in printing).

[fol. 35]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

[Title omitted]

**MOTION OF RAILROAD DEFENDANTS FOR LEAVE TO INTERVENE
AS DEFENDANTS—Filed February 3, 1960**

Now come The Pennsylvania Railroad Company; Wabash Railroad Company; The Baltimore and Ohio Railroad Com-

pany; The New York Central Railroad Company; Erie Railroad Company; The Chesapeake and Ohio Railroad Company; The New York, Chicago and St. Louis Railroad Company; Grand Trunk Railway System; Atchison, Topeka and Santa Fe Railway Company; Chicago and North Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad; Illinois Central Railroad; Chicago, Rock Island and Pacific Railroad Company; Gulf, Mobile and Ohio Railroad; Chicago, Great Western Railway; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; and Chicago, Burlington & Quincy Railroad Company, corporations, and respectfully move this Honorable Court for leave to intervene as defendants in this action and as grounds therefor say:

1. Applicants for intervention are common carriers by railroad engaged in the transportation of property between points in Illinois and New York, and other states, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

[fol. 36] 2. The above-entitled cause was instituted in this Court by the filing of a complaint on or about November 16, 1959. Said complaint seeks to have set aside the Fourth Section Order No. 19059 made and entered by the Interstate Commerce Commission, Division 2, on January 9, 1959. This order was made upon the application of your applicants for intervention herein and gave them temporary relief from the provisions of Section 4 of the Interstate Commerce Act, pending investigation of the rail rates published by your applicants for intervention in I.C.C. Docket No. 32790, *Corn, Oats, Soybeans—Illinois to the East*.

The Commission case was heard during July, 1959, but before an Examiner's Proposed Report was issued, was reopened and consolidated with the Commission's Docket No. 33132, *Grain and Soybeans—Illinois to the East*, with further hearing now pending.

3. Applicants for intervention are parties in the above-entitled Commission proceedings and have a substantial interest in the Commission's Fourth Section Order No. 19059 assailed and sought to be set aside by complainants

herein and, under statutes of the United States (28 U.S.C.A. Sec. 2323) and Rule 24 of the Federal Rules of Civil Procedure, have a right to intervene herein against said plaintiffs.

4. This petition is accompanied by applicants' proposed answer, attached hereto, and made a part hereof, which sets forth the defenses for which intervention is sought by applicants.

Wherefore, applicants for intervention pray that this Court enter an order granting them leave to intervene herein as defendants, with leave to file said proposed answer as their answer herein and for such other and further relief as to this Court may seem just.

Respectfully submitted,

Donald M. Tolmie, Room 652—Union Station, Chicago 6, Illinois; Eugene S. Davis, 1667 Railway Exchange Building, St. Louis 1, Missouri; Richard [fol. 37] J. Murphy, 1225 LaSalle Street Station, Chicago 5, Illinois; James A. Gillen and James E. Steffarud, 547 West Jackson Boulevard, Chicago 6, Illinois; Don McDevitt, LaSalle Street Station, Chicago 5, Illinois; John W. Adams, 104 St. Francis Street, Mobile 13, Alabama; James M. Souby, Jr., 80 East Jackson Boulevard, Chicago 4, Illinois.

[fol. 38]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

NOTICE OF MOTION—Filed February 3, 1960

Sirs:

Please Take Notice that upon the annexed motion of The Pennsylvania Railroad Company, Wabash Railroad Company, The Baltimore and Ohio Railroad Company, The

New York Central Railroad Company, Erie Railroad Company, The Chesapeake and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, Grand Trunk Railway System, Atchison, Topeka and Santa Fe Railway Company, Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad, Illinois Central Railroad, Chicago, Rock Island and Pacific Railroad Company, Gulf, Mobile and Ohio Railroad, Chicago, Great Western Railway, Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, and Chicago, Burlington & Quincy Railroad Company, dated February 3, 1960, and upon all of the proceedings heretofore had herein, the undersigned will on the 26th day of February, 1960, at 9:30 a.m. of that day or as soon thereafter as counsel can be heard, respectfully move the Honorable Three Judge Court constituted and convened to hear and determine the within motion for an order granting the aforesaid applicants for intervention leave to intervene as parties defendant and granting them leave to forthwith file their answer to the complaint herein.

Respectfully,

Eugene S. Davis, Attorney for Applicants for Intervention, 1667 Railway Exchange Building, St. Louis 1, Missouri.

[fol. 39] CERTIFICATE OF SERVICE (omitted in printing).

—
[fol. 40]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

PROPOSED ANSWER OF INTERVENING DEFENDANTS—
Filed February 26, 1960

Now come The Pennsylvania Railroad Company, Wabash Railroad Company, The Baltimore and Ohio Railroad Company, The New York Central Railroad Company, Erie

Railroad Company, The Chesapeake and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, Grand Trunk Railway System, Atchison, Topeka and Santa Fe Railway Company, Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad, Illinois Central Railroad, Chicago, Rock Island and Pacific Railroad Company, Gulf, Mobile and Ohio Railroad, Chicago, Great Western Railway, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, and Chicago, Burlington & Quincy Railroad Company and for answer to the complaint filed herein respectfully allege that they are common carriers by railroad and as such are subject to the provisions of the Interstate Commerce Act. They are among the applicants in the proceedings before the Interstate Commerce Commission known as Fourth Section Applications Nos. FSA-35140, FSA-35507, FSA-35559, and FSA-35623 on the Commission's docket, in which proceedings the orders complained of were made. They have been permitted to intervene in this cause pursuant to an order of this Honorable Court.

[fol. 41] In answer to the complaint, intervening defendants say:

First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

Plaintiffs may not maintain this suit for failure to exhaust their administrative remedies.

Third Defense

The complaint, with respect to the request for a declaratory judgment, should be dismissed for the reason that the Court does not have jurisdiction to grant relief by way of declaratory judgment against the defendants.

Fourth Defense

Further answering but without waiver of their defenses hereinbefore made, the intervening defendants answer and say:

I.

In answer to paragraph 1 of the complaint, intervening defendants admit that plaintiffs' action is stated to be brought pursuant to certain cited statutes of the United States, but they deny that the Court has jurisdiction under these statutes to entertain plaintiffs' action and grant relief thereon.

II.

In answer to paragraphs 2, 3, 4, 5 and 6, intervening defendants admit the allegations contained therein.

III.

In answer to paragraph 7, intervening defendants admit that the rate-making agreement of Waterways Freight Bureau has been approved by the Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b, that it protested the rates here involved and the temporary relief from the long and short haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. Section 4, and the filing of a protest with the Commission by Mechling against the rates and the granting of fourth-section relief. Intervening defendants neither admit nor deny the remaining allegations contained in this paragraph [fol. 42] for lack of knowledge and information.

IV.

In answer to paragraph 8, intervening defendants admit the allegations contained therein except that the restriction that the through combination could not be lower than the local rate from Chicago to the involved destination does not apply on the grain involved arriving at Chicago by barge and that these matters are before the Commission in the involved dockets and the Commission has as yet made no findings with respect thereto.

V.

In answer to paragraph 9, intervening defendants admit the allegations contained therein.

VI.

In answer to paragraph 10, intervening defendants admit that on or about December 4, 1958, the rail carriers parties to the aforesaid tariffs filed with the Commission an application for relief from the provisions of Section 4 of the Act which application was docketed as Fourth Section Application No. 35140; and that plaintiffs Cargill and Mechling and Waterways Freight Bureau filed the designated pleadings, except that to the remaining allegations of this paragraph intervening defendants aver that they are argumentative in the nature to which no answer is required.

VII.

In answer to paragraphs 11, 12 and 13, intervening defendants admit the allegations contained therein.

VIII.

In answer to paragraph 14, intervening defendants admit that the proceedings in Docket No. 32790 and Fourth Section Application No. 35140 were heard at Chicago, Illinois, before an Examiner of the Commission, commencing July 7, 1959, and ending July 16, 1959, except that intervening defendants aver that the hearing before a Commission examiner did not constitute a final hearing foreclosing the possibility of reopening for further hearing.

IX.

In answer to paragraph 15, intervening defendants admit [fol. 43] the filing of the designated pleadings and fourth section applications with the Commission, except that intervening defendants respectfully refer the Court to the fourth section applications Nos. 35507, 35623 and 35559 for a complete and accurate statement of the matters contained therein; admit the entry of the designated orders of the Commission. Intervening defendants aver that the Commission had set the matter down for further hearing before an examiner at Chicago, Illinois, on February 1, 1960, but that at the joint request of the applicant railroads and plaintiff Cargill the hearing has been postponed indefinitely.

X.

In answer to paragraph 16, intervening defendants aver that the allegations contained therein are argumentative in nature and require no answer.

XI.

In answer to paragraph 17, intervening defendants deny the allegation contained therein. Defendants aver that the action of the Commission is valid and lawful in all respects and the results of this lawful and valid action do not constitute any legal basis for instituting or maintaining this suit.

XII.

In answer to paragraph 18, intervening defendants deny that the designated orders of the Commission are void and unlawful for the reasons specified or for any other reasons.

XIII.

In answer to paragraph 19, intervening defendants aver that the allegations contained therein are argumentative in nature and do not require an answer, and in any case do not afford a basis for a declaratory judgment. Intervening defendants further aver that the Court is without jurisdiction to render a declaratory judgment.

XIV.

In answer to paragraph 20, intervening defendants deny the allegation contained therein. Intervening defendants aver that the orders of the Commission in this proceeding are lawful and valid in all respects and the results of these lawful and valid orders of the Commission do not constitute a legal basis for instituting and maintaining this cause.

[fol. 44] Further answering, intervening defendants aver that plaintiffs have not shown any legal damage to require the issuance of an interlocutory injunction pending determination by this Court of this suit.

Wherefore, intervening defendants pray that the relief sought in the complaint be denied, and that the complaint

be denied, and that the complaint be dismissed, plaintiffs to pay the costs.

Respectfully submitted,

Donald M. Tolmie, 652 Union Station, Chicago 6, Illinois; Eugene S. Davis, 1667 Railway Exchange Building, St. Louis 1, Missouri; Richard J. Murphy, 1225 LaSalle Street Station, Chicago 5, Illinois; James A. Gillen, James E. Steffarud, 547 W. Jackson Blvd., Chicago 6, Illinois; Don McDevitt, LaSalle Street Station, Chicago 5, Illinois; John W. Adams, 104 St. Francis St., Mobile 13, Alabama; James M. Souby, Jr., 80 E. Jackson Blvd., Chicago 4, Illinois.

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

MOTION OF UNITED STATES AND INTERSTATE COMMERCE
COMMISSION TO DISMISS COMPLAINT—Filed April 11, 1960

Now come the defendants United States of America and the Interstate Commerce Commission and move this Court to dismiss the complaint because (1) the cause is moot, and (2) the Court is without jurisdiction to grant relief by way of declaratory judgment against the defendants. As reasons hereto the defendants state as follows:

I.

The cause is moot.

The complaint challenges the validity of the Commission's Fourth Section Order No. 19059, as supplemented, entered in the proceeding entitled *Grain and Grain Products from Illinois to the East*. By this order, as amended, the rail carriers were granted temporary authority by the Commission, pending hearing, to publish rates which would depart

from the long and short haul provisions of Section 4 of [fol. 49] the Interstate Commerce Act, 49 U.S.C. Section 4. The fourth section of the Interstate Commerce Act provides in part:

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distance point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: * * *

The Act has not taken away the right of the carriers " * * * to initiate rates * * * in the first instance * * *." *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 564. However, where rail or water carriers subject to Part I of the Interstate Commerce Act (49 U.S.C. Section 1, et seq.) seek to publish rates which would result in lower charges for a long-haul movement than for shorter distances, prior approval must be obtained from the Commis-

sion pursuant to Section 4 of the Act. Nevertheless, where carriers have in effect rates which do not comply with the provisions of Section 4 of the Act, either with or without approval of the Commission, they are free to exercise their option of removing the discrimination, "either by raising the lower rate to the relative level of the higher, or by lowering the higher to the relative level of the lower, or by [fol. 50] equalizing conditions through fixing rates at some intermediate point." *Skinner & Eddy Corp. v. United States, supra*, at 566. Since the filing of the complaint in the instant case, the rail carriers, exercising their option, have put in effect new schedules containing reduced rates at the intermediate points, thus eliminating the fourth section departures. As a result of this action, the rail carriers no longer require the temporary fourth section authority granted by the Commission which is challenged here by the plaintiffs.

By letter dated March 28, 1960 (see Appendix 1), the rail carriers notified the Commission of the withdrawal of the fourth section applications and requested cancellation of the temporary fourth section orders which are the subject of the complaint. On March 31, 1960, the Commission acknowledged the withdrawal of the fourth section applications. (See Appendix 2, letter by Harold D. McCoy, Secretary of the Commission, addressed to Mr. E. W. Heimert, Manager, Central Territory Traffic Commerce Bureau, and Traffic Executive Association—Eastern Railroads.)

In view of the action taken by the railroads, which has eliminated the need for fourth section relief, the matter before this Court is now moot. See *Coastwise Lines v. United States and Interstate Commerce Commission*, 157 F. Supp. 305, and see also *Arkansas & Louisiana Missouri Railway Co. v. Amarillo-Borger Express, Inc.*, 352 U.S. 1028; *Dixie Carriers, Inc. v. United States*, 359 U.S. 179. Since the matter has been rendered moot by the filing of the new schedules of rates (see *Coastwise Lines v. United States and Interstate Commerce Commission*, 157 F. Supp. 305, 306), there no longer exists any basis for plaintiffs' prayer for a declaratory judgment, assuming jurisdiction in this Court to afford such relief against these defendants.

Taylor v. McElroy, 360 U.S. 709; *Shank v. National Labor Relations Board*, 260 F. 2d 444; *Winsor v. Daumit*, 185 F. 2d 41. Thus, "The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325; *Brown v. Ramsey*, 185 F. 2d 225, CA 8; see also *United States v. Hamburg American Co.*, 239 U.S. 466, where the Supreme Court stated at pages 475-476:

The duty of this court as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

The complaint should be dismissed because the matter is moot.

II.

Plaintiffs are not entitled to relief by way of Declaratory Judgment.

In the event the Court is of the opinion that the matter is not moot, then it is urged that the complaint be dismissed because relief by way of declaratory judgment is not available to the plaintiffs. In *Public Service Commission of Utah v. Wycoff*, 344 U.S. 273, at page 246, the Supreme Court specifically held that " * * * the declaratory

judgment procedure will not be used to preempt and pre-judge issues that are committed for initial decision to an administrative body or special tribunal *any more than it* [fol. 52] *will be used as a substitute for statutory methods of review.*" (Emphasis added). See also *Transamerica Corp. v. McCabe*, 80 F. Supp. 704, 707, and *Magnolia Petroleum Co. v. Texas Illinois Nat. Gas P. Co.*, 130 F. Supp. 890. Since the provisions of the Urgent Deficiencies Act, 28 U.S.C., Sections 1336, 2284, 2321-25, expressly provide the sole "statutory methods of review" of orders of the Interstate Commerce Commission such as those challenged here, relief by way of declaratory judgment cannot be used as a substitute. *Charles Noeding Trucking Co. v. United States*, 29 F. Supp. 537, 553-554.

In any case, the Declaratory Judgment Act is inapplicable to this cause for the reason that the requisite consent of the United States to be sued for a declaratory judgment is lacking. See *Love v. United States*, 108 F. 2d 43, 50, CA 8, cert. den. 309 U.S. 673; *Isner v. Interstate Commerce Commission*, 90 F. Supp. 361; *Yeskel v. United States*, 31 F. Supp. 956, 958. The United States, which is the statutory defendant in this case, has waived its sovereignty from suit in this type of action only to the extent set forth in Title 28, U.S.C., Sections 1336, 2284, and 2321-25, and such waiver cannot be enlarged by joining in such suit a prayer for a declaratory judgment.

For the reasons stated above, it is respectfully submitted that the complaint should be dismissed.

Robert W. Ginnane, General Counsel; H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

[fol. 53] Robert A. Bicks, Acting Assistant Attorney General; William H. Webster, United States Attorney, St. Louis 1, Missouri; James H. Durkin, Attorney, Department of Justice, Washington 25, D. C., Attorneys for United States of America.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 54]

APPENDIX 1 TO MOTION TO DISMISS**TRAFFIC EXECUTIVE ASSOCIATION—
EASTERN RAILROADS**

E. V. Hill, Chairman
R. C. Gill, General Commerce Manager

**CENTRAL TERRITORY TRAFFIC
COMMERCE BUREAU**
E. W. Heimert, Manager

**1100 State Madison Bldg.
22 W. Madison Street
Chicago 2, Illinois
Tel. FInancial 6-3520**

March 28, 1960

File: D-ICC Dkt. 32790

**Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.**

Dear Sir:

On December 4, 1958, Tariff Publishing Officer Hinsch filed Fourth Section Application No. 35140 seeking relief in connection with adjustment of rates on grain and grain products from northwestern Illinois to destinations in Official territory as designated therein, seeking authority to maintain higher rates from intermediate territory Chicago and east. By Fourth Section Order No. 19059 the Commission issued temporary relief permitting the establishment of the rates sought effective January 10, 1959. Subsequent to the original application, the following Fourth Section Applications were filed: 35507, 35559 and 35623. These Applications expanded the origin territory included in the original Application. By supplements to the original order the Commission permitted temporary relief from the addi-

tional territory. The original Application was set down for hearing with investigation in I.C.C. Docket No. 32790.

In July, 1959, a hearing was held in that investigation before Examiner Kassel. Subsequently a petition was filed for further hearing on Fourth Section Application 35140 and I.C.C. Docket 32790, also for consolidation of that proceeding with the other Fourth Section Applications and Investigation Docket No. 33132. By order dated October 28, 1959, the Commission consolidated the proceedings and ordered further hearing.

[fol. 55] The applicant railroads published, effective March 10, 1960, reduced rates from Chicago and points east thereof in the tariffs listed in Appendix A. These publications reduced the rates from intermediate points via all short tariff routes from all origins included in the aforementioned Fourth Section Applications so that they in no case exceed the rate from the more distant points in northwestern Illinois or Wisconsin.

By virtue of these tariff publications relief from the provisions of Section 4 of the Act is no longer required in connection with the adjustment involved and the tariff situations that made necessary the filing of the aforementioned Applications no longer exist. For these reasons applicants wish to withdraw, and do hereby withdraw, the following Fourth Section Applications: 35140, 35507, 35559 and 35623. It is our understanding that the result of this withdrawal is the discontinuance of any proceedings under those application numbers, and that the temporary Fourth Section Orders issued in response to this Application will be cancelled and the authority discontinued.

A copy of this letter is being mailed to all parties of record.

Very truly yours,

E. W. HEIMERT
On Behalf of Applicants

Encl.

EWH:de

[fol. 56]

APPENDIX A TO APPENDIX 1

<i>Issuing Agency</i>	<i>Tariff</i>
Central Territory Railroads Tariff Bureau	Supplements 150 and 151 to Freight Tariff 245-H, I.C.C. 4493 (Hirsch Series)
Central Territory Railroads Tariff Bureau	Supplement 75 to Freight Tariff 535-C, I.C.C. 4499 (Hirsch Series)
Trunk Line—Central Terri- tory Railroads Tariff Bu- reau	Supplements 3 and 4 to Freight Tariff 111-Q, I.C.C. C-64
Chesapeake and Ohio Rail- way Company	Supplement 45 to Freight Tariff 2410-F, I.C.C. 13591
Chicago & Eastern Illinois Railroad Company	Supplement 6 to Freight Tariff 610-C, I.C.C. 300
Chicago, Milwaukee, St. Paul and Pacific Railroad Com- pany	Supplement 24 to G.F.D. No. 15165-F, I.C.C. No. B-7721
Chicago South Shore and South Bend Railroad	Supplement 4 to Freight Tariff 95-E, I.C.C. 225
Erie Railroad Company	Supplement 30 to Freight Tariff 182-K, I.C.C. A-7719
Grand Trunk Western Rail- road Company	Supplement 44 to Freight Tariff 309-L, I.C.C. A-78
Illinois Central Railroad Company	Supplement 24 to Tariff 1809-Q, I.C.C. A-11566
Monon Railroad	Supplement 43 to Freight Tariff 520-H, I.C.C. 4792
New York Central Railroad Company	Supplement 199 to Freight Tariff 701-A, I.C.C. 1169
New York, Chicago and St. Louis Railroad Company	Supplement 41 to Freight Tariff 15-X, I.C.C. 6299

<i>Issuing Agency</i>	<i>Tarif</i>
Pennsylvania Railroad Company	Supplement 86 to Freight Tariff 73-E, I.C.C. 3311
Wabash Railroad Company	Supplement 90 to Freight Tariff 19730-B, I.C.C. 7646

[fol. 57]

APPENDIX 2 TO MOTION TO DISMISS

PWC/mtm

March 31, 1960
F. S. A. 35140
35507
35559-
35623

Mr. E. W. Heimert, Manager,
 Central Territory Traffic Commerce Bureau,
 Traffic Executive Association-Eastern Railroads,
 22 West Madison Street,
 Chicago 2, Illinois.

Dear Sir:

This has reference to your letter of March 28, 1960, file D-ICC Dkt. 32790, relative to long-and-short-haul relief sought by the above-numbered fourth-section applications with respect to rates on grain and related articles, in car-loads, from points in Illinois.

Your letter states that, by publication of rates from Chicago, Ill., and points east thereof, the rates covered by these applications have been conformed to the provisions of section 4 of the Interstate Commerce Act, and that the relief sought is no longer necessary.

Accordingly, applications Nos. 35140, 35507, 35559, and 35623 will be considered as withdrawn.

Respectfully,

Secretary.

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

**MOTION OF INTERVENING RAILROAD DEFENDANTS TO DISMISS
COMPLAINT—Filed April 14, 1960**

Now come the Railroad Intervening Defendants in the above-entitled action and move to dismiss the complaint for the reasons that:

1. The facts have altered since the filing of the complaint which make the issue of injunctive relief moot;
2. There is not an "actual controversy" within the scope of the Declaratory Judgment Act necessary for the jurisdiction of the Court; and
3. A declaratory judgment is inappropriate since the Urgent Deficiencies Act, 28 U.S.C. §1336, 2284, 2321-25, provide for the sole statutory method of review of orders of the Interstate Commerce Commission.

Wherefore, Intervening Defendants pray that this Court enter an order dismissing the complaint.

Respectfully submitted,

Donald M. Tolmie, Room 652—Union Station, Chicago 6, Illinois; Eugene S. Davis, 1667 Railway Exchange Building, St. Louis 1, Missouri; Richard [fol. 59] J. Murphy, 1225 LaSalle Street Station, Chicago 5, Illinois; James A. Gillen and James E. Steffard, 547 West Jackson Boulevard, Chicago 6, Illinois; Don McDevitt, LaSalle Street Station, Chicago 5, Illinois; John W. Adams, 104 St. Francis Street, Mobile 13, Alabama; James M. Souby, Jr., 80 East Jackson Boulevard, Chicago 4, Illinois.

[fol. 63]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

MOTION OF BARGE LINE PLAINTIFFS FOR SUMMARY JUDGMENT
—Filed June 23, 1960

Come now the barge line plaintiffs, by their attorneys, Lord, Bissell & Brook, Edward B. Hayes, Wilbur S. Legg, Thompson, Mitchell, Douglas & Neill, William G. Guerri and J. Richard Skouby, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court for a determination that no issue of fact is presented in this proceeding and further that, after submission of briefs as hereinafter more specifically prayed, the Court enter summarily (sic) judgment as prayed in the Complaint herein. For their reasons these plaintiffs show the Court that:

1. Plaintiffs on November 16, 1959, filed their complaint against defendants, United States of America and the Interstate Commerce Commission, which said Complaint con-
[fol. 64] sisted of twenty numbered paragraphs and a prayer for relief.
2. On January 15, 1960, the aforesaid defendants filed their answer to plaintiffs' Complaint, which said Answer admitted the factual allegations of the Complaint in their entirety, except as to those facts which it neither admitted nor denied because of lack of knowledge, and those as to which it stated no answer was required. The said answer denied certain legal conclusions stated in the Complaint but it did not deny any allegations of fact.
3. Thereafter, the intervening defendants were permitted to file their answer to plaintiffs' complaint which said answer was substantially identical to the answer of the defendants United States and Interstate Commerce Commission, referred to heretofore and which answer ad-

mitted or failed to deny all the factual allegations of the plaintiffs' complaint.

4. As the pleadings in this cause demonstrate, there is no genuine issue of fact involved, all facts having been admitted and the cause is, therefore, in a posture to allow the Court to dispose of it summarily and thus avoid expense, vexation and delay.

5. The allegations of fact contained in plaintiffs' complaint are supported by affidavits of persons having personal knowledge thereof, which are submitted with this [fol. 65] motion.

6. Defendants have further averred in their answers aforesaid that plaintiffs' have not shown legal damage sufficient to justify the issuance of an interlocutory injunction pending determination of this suit by this Court. Affidavits filed herewith set forth the damage which has been sustained and will be suffered by plaintiffs as the result of the void and illegal actions of the Interstate Commerce Commission in granting "temporary authority" orders permitting Fourth Section Violations by the intervening defendants.

Wherefore, plaintiffs ask for a ruling by this Court that this cause presents no genuine issue of material fact and is suitable for determination under the summary judgment procedures provided by Rule 56 of the Federal Rules of Civil Procedure.

Plaintiffs further ask that in the event the Court so rules, it grant plaintiffs 30 (thirty) days in which to present their brief on the merits of their Complaint, 30 (thirty) days for defendants to answer and 15 (fifteen) additional days for plaintiffs to reply, after which plaintiffs pray that this Court grant summary judgment in their favor upon the Complaint and affidavits filed herein.

[fol. 66] William G. Guerri, J. Richard Skouby, 705
Olive Street, St. Louis, Missouri, Phone: CEntral
1-0545.

Thompson, Mitchell, Douglas & Neill, 705 Olive Street,
St. Louis, Missouri.

Edward B. Hayes, Wilbur S. Legg, 135 South La-Salle Street, Chicago 3, Illinois.

Lord, Bissell & Brook, 135 South LaSalle Street, Chicago 3, Illinois.

Attorneys for Plaintiffs, A. L. Mechling Barge Lines, Inc., Mississippi Valley Barge Line Company, The Ohio River Company, Blaske, Inc.

[fol. 67]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF WESLEY A. ROGERS

State of Illinois,
County of Cook, ss.:

Affiant being first duly sworn on oath, deposes and says as follows:

1. Affiant is the Chairman of the Waterways Freight Bureau, 28 East Jackson Boulevard, Chicago 4, Illinois, an association organized under authority of the Interstate Commerce Commission extended under Section 5a of the Interstate Commerce Act. The fifteen members of the Waterways Freight Bureau account for virtually all the [fol. 68] grain transported by barge to Chicago, Illinois from the Illinois Waterway ports of Lacon, Hennepin, Henry, Spring Valley, La Salle, Ottawa, Seneca, Morris, Joliet and Lockport, Illinois. Of the various members engaged in such transportation A. L. Mechling Barge Lines Inc. is, and has been for some time, the carrier of the largest volume of such grain. The Ohio River Company, Mississippi Valley Barge Line Company, and American Commercial Barge Line Company with its subsidiary Blaske, Inc. also carry appreciable amounts of grain in such trade.

2. On December 4, 1958, the Western and Eastern Railroads published tariffs of rail rates to be effective January 10, 1959, which reduced combination rail rates from most origins in Illinois north of the Illinois River upstream from Spring Valley, Illinois, to eastern destinations. These rates applied to corn, oats and soybeans and their products when shipped by rail via Chicago. These combination rates were lower than the then existing rail rates charged for shorter rail hauls from Chicago and other intermediate origins over the same line to the same eastern destinations, and the involved railroads therefore applied to the Interstate Commerce Commission for authorization to charge these rates which without such authority would have been prohibited by Section 4 of the Interstate Commerce Act. On [fol. 69] behalf of all interested members of the Waterways Freight Bureau, affiant protested to the Commission against the grant of requested authority. Nevertheless without any prior hearing on January 9, 1959, the Commission entered its Fourth Section Order No. 19059, granting authority to make the reduced rates effective, but made no findings in said order, other than statements that the Commission did not approve the rates and that a hearing would be held. On January 10, 1959, said reduced combination rates became effective and continued in effect until March 10, 1960, when they were superseded by single factor rates at the same level. After requesting and being denied reconsideration of the Commission's Fourth Section Order No. 19059, the Waterways Freight Bureau participated in hearings held from July 7, 1959 to July 16, 1959, before an Examiner appointed by the Commission. It now appears that by reason of said railroads' publication of the aforesaid single factor rates no order with respect to the rates published on January 10, 1959 and containing findings based on evidence will ever be entered by the Commission.

3. Members of the Waterways Freight Bureau have reported to affiant the amount of corn, oats and soybeans they carried to Chicago from the ten Illinois River ports named above during the years 1958 and 1959. A compilation [fol. 70] of these reports shows that during the calendar year 1958 members of the Waterways Freight Bureau transported 1,210,821 tons (of 2,000 lbs.) of corn, oats and

soybeans to Chicago via the Illinois River from the ten river ports listed in paragraph 1 of this affidavit. During the calendar year 1959 this tonnage figure was reduced to 1,020,860 tons.

4. Between April 9, 1958 and November 19, 1959 the Waterways Freight Bureau protested nine separate and distinct Fourth Section relief applications in which "temporary" Fourth Section relief was sought and obtained from the Interstate Commerce Commission. Of those nine, only one has finally reached a final determination granting permanent Fourth Section relief, and that was after the "temporary" rates had been in effect sixteen months. In one case the Fourth Section application was withdrawn shortly after a temporary restraining order against the Commission was obtained from the District Court, and in still another case the Fourth Section application was withdrawn before any hearings were held. These rates, however, had been in effect four or five months. In the case which gave rise to the instant lawsuit, the Fourth Section application was withdrawn by the carrier applicant after the Commission's temporary order was challenged in this Court but [fol. 71] not until the protested "temporary" rates had been in effect fourteen months. The remaining five cases are still awaiting decision from the Commission. As to these cases the railroads involved have been operating under temporary authority for periods ranging from seven to eighteen months. Three of these cases have never been heard at all, while the final two are still awaiting decisions from the Commission on hearings completed in March of 1959.

Further affiant sayeth not.

Wesley A. Rogers

Subscribed and Sworn to before
me this 22nd day of June, 1960.

Beatrice L. McManus, Notary Public.

[fol. 72]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF F. A. MECHLING

State of Illinois,
County of Will, ss.:

Affiant being first duly sworn, on oath deposes and says as follows:

1. He is the Executive Vice President of A. L. Mechling Barge Lines Inc., 51 North Desplaines Street, Joliet, Illinois (hereinafter called "Mechling"), and by virtue of his position has knowledge of the business operations of that company. He has been associated with that company in various capacities since 1939.

[fol. 73] 2. Mechling is a common carrier by water, holding certificates of public convenience and necessity for such common carriage from the Interstate Commerce Commission (hereinafter sometimes called the "Commission") and from the Illinois Commerce Commission. Such certificates, among other things, authorize Mechling to transport grain in interstate and intrastate commerce from points on the Illinois River and Waterway to Chicago, Illinois. Mechling has been for several years a principal barge water carrier of grain to Chicago, transporting from sixty per cent to seventy per cent of the grain carried by water to Chicago via the Illinois River and Waterway.

3. On June 28, 1957, the "Traffic Executive Association—Eastern Railroads" acting on behalf of western and eastern railroads but principally on behalf of the New York Central Railroad, applied to the Interstate Commerce Commission for authorization to be relieved from the prohibitions of Section 4 of the Interstate Commerce Act, in order that such railroads might charge certain lower combination

rates for the transportation of corn and corn products from origin stations on the New York Central Railroad west of Kankakee, Illinois (this part of the New York Central Railroad, coming into Kankakee from the west, roughly parallels the Illinois River and Waterway to Chicago at distances of four to twenty-five miles) to destinations east of Kankakee; which combination rail rates from west of Kankakee [fol. 74] to the east would be *lower* than the rail rates contemporaneously charged for the *shorter* hauls from origin stations east of Kankakee on the same line to the same eastern destinations. Such reduction in the combination rail rates to the east from New York Central origins west of Kankakee was effected by reduction of the factor in those rates applying for the part of the rail haul up to Kankakee.

Mechling, together with the Indiana Farm Bureau Co-operative Association, the Chicago Board of Trade, various grain shippers, and various country elevator operators on other railroads competing with elevators at the origin stations on the New York Central Railroad west of Kankakee, filed protests with the Interstate Commerce Commission against this application to depart from Section 4 of the Interstate Commerce Act, alleging among other things that the reduced factor of the combination rate applicable to transportation of corn from its origin to Kankakee, Illinois, which was competitive with barge transportation, was so low that it was noncompensatory to the railroads, and that it was lower than necessary to meet barge competition and thus destructively competitive of the water competition used to justify it. Nevertheless on August 27, 1957, the Commission issued its Fourth Section Order No. 18784, authorizing the railroads to charge such lower rate combination and for longer rail hauls. This order contained [fol. 75] no findings as to the propriety of the rates other than statements that the Commission did not approve the rates for which it stated it gave authority and that a hearing would be held with respect to them. On August 28, 1957, on the complaint of Mechling and Cargill, Inc., in The District Court of the United States for the Northern District of Illinois, Eastern Division, in Civil No. 57 C 1450, the court issued a temporary restraining order prohibiting the charging of these reduced rates from the origins west

of Kankakee. This temporary restraining order remained in effect until November 28, 1957, when the action in which it was entered was dismissed on motion of the United States without hearing on the merits. Thereafter, from January 29 through February 4, 1958, the Commission by its Examiner held the hearing referred to in its said Fourth Section Order No. 18784.

On or about March 16, 1959, the Commission's Examiner, having conducted said hearings and heard the evidence, issued a report analyzing the evidence and finding thereon that the New York Central Railroad's said reduced barge-competitive rate was too low to meet the costs of the railroad in handling the traffic moving on such depressed rail rate, saying (referring to said rate) that: "The conclusion that the proposed rate will not meet the bare out-of-pocket costs is inescapable"; and further finding that said rate is lower than necessary to meet barge competition; and [fol. 76] recommending, therefore, that the said application of the railroads on June 28, 1957, for authority to depart from the long-haul short-haul rule of Section 4 be denied.

On October 29, 1959, the Commission heard oral arguments on the exceptions to the Examiner's report and the replies thereto which had been submitted by June 5, 1959. To date the Commission has issued no further order in this proceeding, and the said new rail rates which depart from the long-haul short-haul requirement of Section 4, which the Commission has never approved, and which its Examiner has condemned as noncompensatory and destructive as above, remain in effect under the said "temporary" order of August, 1957. These rates were avowedly designed by the rail proponents thereof to divert corn produced in the area south of the Illinois River from the water carriers on the Illinois River to the New York Central Railroad, and have in fact diverted large amounts of corn from Mechling to the New York Central Railroad, to the continuing and irreparable injury of Mechling.

4. On December 4, 1958, the Western and Eastern Railroads published other tariffs of rail rates to be effective January 10, 1959, which reduced combination rail rates from most origins in Illinois north of the Illinois River upstream from Spring Valley, Illinois, to eastern destina-

tions. These rates applied to corn, oats and soybeans, and many products of these grains when transportation was [fol. 77] via Chicago. These combination rates, when published, were lower than the rail rates contemporaneously charged for shorter rail hauls from Chicago and other intermediate origins over the same line to the same eastern destinations, and the railroads therefore applied to the Commission for authorization of these further departures from the long-and-short haul prohibition of Section 4 of the Interstate Commerce Act. Mechling, the Waterways Freight Bureau, Cargill, Inc. and other shippers and various cities again protested grant of such authority and requested a hearing, but nevertheless, on January 9, 1959, the Commission entered its Fourth Section Order No. 19059, stating that it granted authority to make these reduced rates effective. Again, this order contained no findings as to the propriety of the rates it stated that it authorized other than statements that the Commission did not approve the rates, and that a hearing would be held (no hearing thereon having been held). On January 10, 1959, these further reduced combination rail rates were put into effect. No date for such hearing having been set, on January 29, 1959, Mechling and Cargill, Inc., complainants herein, submitted a petition to the Commission for reconsideration and motion to vacate the Commission's said Fourth Section Order No. 19059, setting forth among other things the lack of findings in the last said order and failure of the Commission to hold the hearing which it had found to be necessary. This petition was denied on or about March 10, 1959. Commencing July 7th and until July 16, 1959, the Commission by its Examiner heard evidence on the application to authorize the last said rates (published on December 4, 1958) in a combined hearing of its Docket No. 32790 and its Fourth Section Application Docket No. 35140. In the meantime the applicant railroads in various additional applications requested extension of the area west of Chicago of the origins from which they could apply these Fourth Section departure rates. Over the protests of Mechling, of Waterways Freight Bureau and Cargill, Inc., the Commission by supplements to its said Fourth Section Order No. 19059 (still without findings or hearing, and with-

out approval of such rates) entered orders stating that it authorized such extensions to be made effective; until, by September 10, 1959, the origin area from which such rail rates were being applied (viz., rates departing from the Fourth Section of the Interstate Commerce Act which the Commission purported to authorize as above stated in detail without any findings as to their propriety except for statements in the orders of authorization that the Commission did not approve them and that a hearing would be held) included territory extending for several miles north and south of the Illinois River and Waterway, from a point near Lacon, Illinois, to Chicago, Illinois.

[fol. 79] Mechling had duly and timely protested to the Commission that the rates so put into effect were so low that, although they were purportedly designed to enable the railroads to compete with the barge transportation on the Illinois River and Waterway to Chicago, they in fact would substantially destroy barge transportation of those products, and affiant so testified during the hearing in F.S.A. 35140. The hearings were closed. On October 31, 1959, the Commission, after petition by the railroads for reopening of the hearings in F.S.A. 35140, and over the objection of Mechling and Waterways Freight Bureau, reopened the hearings, but did not set any date for further hearing. No further hearing has been held thereon. It now appears none will be held, by reason of the fact that the applicant railroads involved in F.S.A. No. 35140 reduced the intermediate rates on the direct routes so as not to be higher than the rates from the said area west of Chicago in which the applicant railroads and barge carriers are competitive.

5. The effect of the reduction of the railroad rates pursuant to the authority to depart from the 4th Section of the Interstate Commerce Act granted by the Commission without findings or approval of such departures in said Orders Nos. 18784 and 19059 as supplemented, has been to reduce the amount of corn, oats and soybeans carried by Mechling to Chicago from Illinois Waterway origins by almost 200,000 [fol. 80] tons annually as determined from a comparison of 1959 movements with those in 1957. During the first quarter of 1960, an even greater decrease in such shipments

has occurred, Mechling's shipments of these grains being less than fifty per cent of even the reduced volume carried in 1959. The loss of this large volume of traffic that has been diverted to the railroads by said depressed rail rates has resulted in loss of the profit usually earned on this portion of Mechling's business, and in addition, has resulted in an operating loss thereon to Mechling of approximately \$85,000.00 in the year 1959, despite reductions in service and other economies in operation effected by Mechling in the meantime. Mechling now has removed from this service nineteen barges (having a total capacity of 18,050 tons) and six towboats which formerly were used in it. It is apparent that affiant's water transportation of grain to Chicago cannot continue if this severe and progressive reduction in the volume carried continues.

Further affiant sayeth not.

F. A. Mechling

Subscribed and Sworn to before
me this 15th day of June, 1960.

Beatrice L. McManus, Notary Public.

[fol. 81]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 59 C 335 (3)

CARGILL, INCORPORATED, a corporation, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants,

THE PENNSYLVANIA RAILROAD COMPANY, et al.,
Intervening Defendants.

**ORDER GRANTING DEFENDANTS' AND INTERVENORS' MOTIONS
TO DISMISS—September 16, 1960**

This cause was presented to the Court upon Motions to Dismiss filed by defendants and intervenors. Oral argument was heard, memoranda filed, and the matter taken under submission. The Court being fully advised in the premises, files its per curiam opinion and in accordance therewith it is

Ordered that defendants' and intervenors' Motions to Dismiss be and the same are hereby sustained and plaintiffs' Complaint is dismissed and the relief therein prayed for denied.

Done this 16th day of September, 1960.

M. C. Matthes, Judge, United States Court of Appeals, Roy W. Harper, Judge, United States District Court, Randolph H. Weber, Judge, United States District Court.

[fol. 82]

**IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 59 C 335 (3)**

**CARGILL, INCORPORATED, a corporation, et al., Plaintiffs,
vs.**

**UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants,**

**THE PENNSYLVANIA RAILROAD COMPANY, et al.,
Intervening Defendants.**

OPINION—September 16, 1960

Before M. C. Matthes, Circuit Judge, Roy W. Harper, Chief Judge, and Randolph H. Weber, District Judge.

Per Curiam.

Plaintiffs are barge line operators. They commenced this action on November 16, 1959, against the United States of America and the Interstate Commerce Commission seeking an injunction of the Commission's Fourth Section order No. 19059, entered January 9, 1959, and for a declaratory judgment. They are in competition with various railroads which can be classified into two groups: one, the eastern group which has trunk lines from Chicago, Illinois, to the east and with proportional or re-shipping rates for long hauls and, two, the western group which has lines serving west of Chicago and with short haul rates that are higher than the eastern long haul rates. These railroads were granted leave to intervene.

[fol. 83] District Courts have jurisdiction of actions to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission, §1336, Title 28, U.S.C., and the action has been brought in the judicial district of parties plaintiff as provided by §1398, Title 28, U.S.C. A three-judge court was duly composed under the provisions of §§2284 and 2321-2325, Title 28, U.S.C. Motions to Dismiss were filed by defendants and intervenors challenging plaintiffs' Petition on the grounds of mootness and that declaratory judgment relief would not lie. These Motions were orally heard, supporting memoranda filed and the matter taken under submission.

The actions of the Interstate Commerce Commission for which plaintiffs seek relief in this suit involve the matter wherein the intervenors published rates with the Commission in which combination (long haul) rates were lower than local (short haul) rates and relief was sought under Section Four of the Interstate Commerce Act.¹ The pro-

¹ §4, Title 49, U.S.C., provides that "it shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate * * *, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * * : Provided, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized * * * to charge less for longer than for shorter distances * * *, and the Commission may from time to time prescribe the extent to which such designated carriers

[fol. 84] ceding was entitled "Grain and Grain Products from Illinois to the East" and the plaintiffs here filed their protests.

The order of the Commission provided that the rates described in the application would become effective January 10, 1959, that they were subject to the Commission's investigation and approval, could not be increased unless authorized and the investigation would be made "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant." The matter was assigned for hearing at a time and place thereafter to be fixed and the intervenors here were permitted to become respondents to the proceedings.

Plaintiffs contend in this action that the establishment of rates, pending the hearing on the Section Four application and prior to actual investigation, hearing and finding of facts, amounts to an avoidance of the prohibitions contained in Section Four, which make it unlawful to charge or receive such rates. They say that such establishment of rates amounts to the granting of a "temporary rate" and is void and unlawful, arbitrary and capricious, thus depriving them of their property without due process of law and violative of the Fifth Amendment to the Constitution. On the declaratory judgment side, plaintiffs contend that this procedure is a continuous practice by the Interstate Commerce Commission; that the Commission thus establishes a rate without support by adequate findings from which it can be determined if the facts constitute a special [fol. 85] case and if the rates are reasonably compensatory, all as required by Section Four; and that the Commission will probably enter a final order of dismissal to make the matter "moot" before this Court can hear and decide the issues and that such practice, too, has been followed in the past and is continuing to plaintiffs' damage.

may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it * * *, the Commission shall not permit the establishment of any charge to or from the more distant point that is *not reasonably* compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; * * *. (Italics supplied for emphasis.)

The defendants and intervenors point out that the rail carriers did notify the Commission on March 28, 1960, of the withdrawal of their Section Four Application and requested cancellation of the Commission's temporary orders. The Commission acted upon this notification on March 31, 1960, and the application was permitted to be withdrawn. They further state that the Commission records show that a new schedule of rates has been filed, reducing the local haul charges to where, in the aggregate, they will not exceed the long haul charges, and therefore, there is no further relief being sought, nor can it be given, under Section Four and the matter is "moot".

Plaintiffs, however, contend that this is a continuing practice of the Commission which results to their damage and say that this should remove the matter from the realm of mootness. They want this Court to not only enjoin and hold unlawful the Section Four order but to also declare the practice improper.

It is the duty of this Court to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect [fol. 86] the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653. This principle was recently restated by the Supreme Court in the case of *Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri*, 361 U.S. 363. In this latter case an injunction had been granted against a union under authority of a Missouri statute; the Supreme Court of Missouri held the statute constitutional and certiorari was granted to the Supreme Court of the United States; in the meantime the injunction had expired and in deciding the matter the Court said at l.c. 367: " • • • we cannot escape the conclusion that there remains for this Court no 'actual matters in controversy essential to the decision of the particular case before it.' *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116."

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Assoc. v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 416, 418. The very proposition here was involved in two recent decisions

wherein the Supreme Court of the United States remanded three-judge court opinions with directions to dismiss for mootness. See *A.T. & S.F. R. Co. v. Dixie Carriers, Inc.*, 143 F. Supp. 844, 355 U.S. 179, and *Amarillo-Borger Express v. United States*, 138 F. Supp. 411, 352 U.S. 1028.

The same reasoning applies to the prayer for declaratory judgment relief. Section 2201, Title 28, U.S.C., creates a [fol. 87] remedy "In a case of actual controversy within its jurisdiction, * * *."

There is nothing pending in the case before us. The cause of any controversy that existed has been terminated by dismissal. To lay down rules of practice for future guidance of the Commission would be nothing more than the substitution of judicial for executive administration. The Judiciary must confine itself within the constitutional and legislative grants of authority to review, determine or declare rights only where actual controversies exist. As said in *Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri*, supra, at l.c. 396: "To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain."

For the reasons stated, defendants' and intervenors' Motions to Dismiss should be sustained and an Order will be entered to that effect.

[fol. 89]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed October 21, 1960

I. Notice is hereby given that A. L. Mechling Barge Lines Inc., Mississippi Valley Barge Line Company, The Ohio River Company, and Blaske, Inc., plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order granting defendants' motion to dis-

miss the complaint entered in this action on September 16, 1960.

This appeal is taken pursuant to 28 USCA § 1253.

II. The Clerk will please prepare a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court.

III. The following questions are presented by this appeal:

1. Does the Interstate Commerce Commission have the power and authority to authorize carriers subject to Part I of the Interstate Commerce Act to charge rates, on a temporary basis or otherwise, which deviate from the requirements of Section 4 of the said [fol. 90] Act, without holding hearings on such rates, the Commission itself having expressly found that hearings were necessary in the matter, and without making any findings of facts to show that a "special case" exists within the meaning of the Act sufficient to justify the allowance of such rate departures under the terms of Section 4 of the Interstate Commerce Act?

2. Are suits reviewing orders of the Interstate Commerce Commission entered as a recurring practice, without hearing or findings of facts, authorizing a carrier subject to the provisions of the Interstate Commerce Act to charge rates which deviate from the requirements of Section 4 of that Act and causing great and repeated injury to the appellants rendered moot because as part of a consistent and repeated practice the carriers withdraw and cancel the rates which are the subject of such orders whenever they are judicially challenged?

Edward B. Hayes, Wilbur S. Legg, Lord, Bissell & Brook, Attorneys for A. L. Mechling Barge Lines Inc., Mississippi Valley Barge Line Company, The Ohio River Company, and Blaske, Inc., 135 So. LaSalle Street, Chicago, Illinois, Phone: RAndolph 6-0466.

[fol. 91] PROOF OF SERVICE (omitted in printing).

[fol. 94]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD AND
DOCKETING APPEAL—December 14, 1960

It appearing to the Court that counsel for the plaintiff-appellants herein are unable without undue hardship to prepare the Jurisdictional Statement to the Supreme Court within the time required by Rule 13 of the Rules of the Supreme Court, it is

Ordered that the time for filing the record and docketing the appeal with the Clerk of the Supreme Court of the United States is enlarged to January 20, 1961.

Dated this 14th day of December, 1960.

Randolph H. Weber, United States District Judge.

[fol. 99] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 100]

SUPREME COURT OF THE UNITED STATES

No. 667—October Term, 1960

A. L. MECHLING BARGE LINES, Inc., et al., Appellants,

vs.

UNITED STATES et al.

ORDER POSTPONING JURISDICTION—April 3, 1961

Appeal from the United States District Court for the Eastern District of Missouri.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

April 3, 1961

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JAMES E. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. ~~657~~ 41

A. L. MECHLING BARGE LINES INC., a corporation,
MISSISSIPPI VALLEY BARGE LINE COMPANY, a
corporation, THE OHIO RIVER COMPANY, a corpora-
tion, and BLASKE, INC., a corporation,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,

Defendants-Appellees.

JURISDICTIONAL STATEMENT.

EDWARD B. HAYES

WILBUR S. LEGG

Attorneys for Appellants.

(Plaintiffs Below)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1960.

No.

A. L. MECHLING BARGE LINES INC., a corporation,
MISSISSIPPI VALLEY BARGE LINE COMPANY, a
corporation, THE OHIO RIVER COMPANY, a corpora-
tion, and BLASKE, INC., a corporation,

Plaintiffs-Appellants,
vs.

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,

Defendants-Appellees.

JURISDICTIONAL STATEMENT.

This appeal is filed on behalf of A. L. Mechling Barge Lines Inc., Mississippi Valley Barge Line Company, The Ohio River Company and Blaske, Inc. These appellants will sometimes hereinafter be referred to as "Barge Lines".

OPINION BELOW.

The opinion of the three-judge United States District Court for the Eastern District of Missouri, Eastern Division, is attached hereto as Appendix A. The final judgment of the District Court, dated September 16, 1960, is attached hereto as Appendix B. The orders of the Interstate Commerce Commission, sometimes referred to hereinafter as the "Commission", dated January 9, 1959, July 17, 1959, August 7, 1959 and September 10, 1959, are attached hereto as Appendices C, D, E, and F.

JURISDICTION.

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325 and 5 U.S.C. § 1009 to set aside and enjoin an order of the Interstate Commerce Commission and also under provisions of 28 U.S.C. § 2201 and 5 U.S.C. § 1009 for a declaratory judgment to settle important questions relating to the power of the Commission (over the written protests of competing regulated carriers) to enter orders relieving railroads from the long-and-short-haul prohibition of Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4, without making the investigation which the statute requires and which the Commission specifically finds necessary and without making any factual findings whatever that the statutory prerequisites for such relief exist. The decree of the District Court was entered on September 16, 1960. The Barge Lines filed their notice of appeal on October 21, 1960. The time for filing this statement and the record below has been extended by order of the court below to January 20, 1961.

The jurisdiction of this Court is confirmed by 28 U.S.C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case. *I.C.C. v. A. L. Mechling Barge Lines Inc.*, 330 U.S. 567 (1947); *Dixie Carriers v. U. S.*, 351 U.S. 56 (1956).

STATUTES INVOLVED.

The following statutes are involved:

The National Transportation Policy, 49 U.S.C., note preceding Section 1; Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4; Section 10 of the Administrative procedure Act, 5 U.S.C. § 1009; The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; and 28 U.S.C. § 2321. The foregoing statutes are set forth in Appendix G attached.

QUESTIONS PRESENTED.

The questions presented by the appeal are as follows:

1. May the Commission over the due and timely protest of adversely affected parties in interest, including these appellants, lawfully authorize carriers by railroad which are subject to Part I of the Interstate Commerce Act forthwith to charge new rates proposed by said railroads which depart from the long haul-short haul requirement of Section 4 of said Act, by entering orders granting such authorization which make no findings of fact whatever, and particularly none disclosing any basis for authorizing said proposed departure rates or showing compliance in respect of such departures with the conditions, standards, requirements or provisions of said Act and Section 4 thereof, said orders providing that the Commission will, at some unstated future time, conduct a hearing to determine whether such departures fulfill the statutory conditions, standards, requirements and provisions under which the Commission is empowered to authorize them?
2. May the Commission over the due and timely protest of adversely affected parties in interest, including these appellants, lawfully enter such orders authorizing such rates to be charged, without making any findings that disclose the existence of a "special case" as described in Section 4 of the Interstate Commerce Act or compliance of such rates with any applicable statutory prerequisites?
3. May the Commission over the due and timely protest of parties in interest who are adversely affected, including these appellants, lawfully enter such said orders authorizing such said rates to be presently charged, without an investigation that enables it presently to approve

said departures from the long-and-short-haul requirement of Section 4 of the Interstate Commerce Act as lawful under the conditions, standards, requirements and provisions of the Interstate Commerce Act and especially Section 4 thereof and the National Transportation Policy?

4. Is judicial review by injunction and declaratory judgment of such an order of the Commission and of the Commission's continuing practice of entering such orders which have been sought in a proceeding duly brought by these appellants as injured protestants and pending, withdrawn from the judicial power of the United States by the railroads' subsequent filing of new rates and withdrawal of their fourth section application for the avowed purpose of avoiding such judicial review, when the Commission does not vacate the order in question, and these appellants have duly alleged that the Commission has repeatedly entered such unlawful orders to appellants' injury, and neither the Commission nor the railroads make any showing or give any assurance that the Commission will not continue to enter such orders in the future, and both cooperate to seek to avoid judicial review of such orders?

5. Can these appellants lawfully be deprived by the said devices of judicial review of the Commission's unvacated "temporary" order, which stands as a defense for the railroads to any proceeding by the appellants against the railroads for the injury caused by the railroads' said departure rates?

6. Has the United States consented to the use of a declaratory judgment in cases such as this, and does 28 U.S.C. § 2321 prohibit the use of a declaratory judgment in such circumstances?

STATEMENT OF FACTS.

The proceeding before the Commission which is under review in this action was initiated by railroads serving the Northern Illinois grain producing area (hereinafter called the Western Railroads) and railroads operating east of Chicago (hereinafter called the Eastern Railroads). The Eastern Railroads and Western Railroads are collectively referred to hereinafter as the Intervening Railroads, or railroads.

On or about December 4, 1958, the railroads published and filed with the Interstate Commerce Commission, certain tariffs to become effective on January 10, 1959.

These tariffs admittedly provided rates which would be in violation of the long-and-short haul provision of Section 4 (49 U.S.C. § 4) of the Interstate Commerce Act, since they established lower rates on certain grain and grain products from Northern Illinois to the East, than were contemporaneously charged for the shorter hauls from intermediate points over the same routes to the East. Admittedly they could not therefore lawfully be made effective, unless the Commission granted relief from the prohibition of Section 4.

Accordingly, on or about December 4, 1958, the railroads, through their agent, H. R. Hinsch, filed with the Commission an application for authority to depart from the provisions of Section 4. That application was docketed by the Commission as Fourth Section Application No. 35140, Corn and Corn Products from Illinois to the East.

Waterways Freight Bureau, representing the appellants, who are barge line operators in competition with the Western Railroads for the traffic to which the normal rates would apply, and whose interests were admittedly

affected adversely by the said proposed rates, and various shippers, filed with the Commission timely protests against the proposed tariffs and against grant of the authorization requested in Fourth Section Application No. 35140. They further filed a petition for suspension of the tariffs. Similarly the appellant, A. L. Mechling Barge Lines Inc., filed such a timely protest and petition. These protests contained factual allegations that in substance the rail rates proposed by the railroads were lower than necessary to meet alleged water competition, threatened the extinction of legitimate water competition, and further were not "reasonably compensatory" as has been defined through long established administrative practice. All protestants offered to produce evidence substantiating their protests at a hearing on the Fourth Section Application.

On January 9, 1959, Division 2 of the Commission entered an order instituting an investigation into, and hearing on, the lawfulness of the rates, designating this proceeding as Docket No. 32790, Corn, Oats, Soybeans—Illinois to East, and *on the same day* entered Fourth Section Order No. 19059, (Appendix C) against which complaint is here made, authorizing the railroads forthwith to establish the proposed rates "until the effective date of the further order to be entered after hearing in fourth section application No. 35140, as amended." This order contained no finding of facts and took effect before the investigation, ordered concurrently therewith, was even commenced and before any hearings could be held. It states expressly that said rates were not approved by the Commission.

These rail rates took effect under authority of said orders on January 10, 1959, to the injury of appellants.

On or about January 28, 1959, Mechling, the Waterways Freight Bureau and a shipper filed petitions for reconsideration and vacation of Fourth Section Order No. 19059, but these were denied on March 10, 1959.

Thereafter, after many continuances and delays, hearings in Docket No. 32790 and Fourth Section Application No. 35140 were held before an Examiner of the Commission, commencing July 7, 1959, and ending July 16, 1959. On or about September 1, 1959, the railroads petitioned the Commission for further hearing in the proceedings and for their consolidation with other proceedings in respect to other related Fourth Section applications, requesting minute extensions of the area affected by the applications. Mechling, Waterways Freight Bureau and the shipper objected to any further hearing, but before the Commission could act on the railroads' petition, the railroads filed a supplementary petition seeking to introduce further evidence on the very matters covered by the hearings recently concluded. Again Mechling, Waterways Freight Bureau and the shipper protested these delaying tactics, but the Commission by Order dated October 29, 1959, reopened Nos. 32790 and F.S.A. No. 35140 for further hearing and consolidated them with other Fourth Section Application proceedings. No date was then set for the new hearing, and no hearings have been held since.

On November 16, 1959, these appellants together with Cargill, Incorporated, filed the complaint herein before a statutory three-judge court to enjoin, set aside, annul and suspend said Fourth Section Order No. 19059, and all orders supplemental thereto, attached hereto as appendices C, D, F and E (all of which hereinafter will be referred to collectively as F.S.O. 19059), and for a declaratory judgment to settle important questions relat-

ing to the power of the Commission over protests and without holding hearings or making findings of fact, to authorize carriers to charge rates conflicting with the long-and-short-haul prohibition of Section 4 of the Interstate Commerce Act.

The complaint alleged the facts heretofore set forth, and in addition alleged in Paragraph 19 that the Commission, despite decisions by three-judge district courts that orders, such as F.S.O. 19059, granting relief from the prohibition of Section 4 must be supported by findings, continues to follow the practice of entering such orders without supporting findings. This Paragraph of the complaint also alleged that earlier cases in which similar relief had been sought were treated as moot before they could be decided by the Supreme Court, and asked that in this case the court enter a declaratory order as well as an injunction.

The United States and the Interstate Commerce Commission filed their answer to appellants' complaint, and, although challenging certain conclusions stated therein, they did not deny any of the factual allegations thereof. The intervening railroads then were permitted to file their answer to appellants' complaint, which answer was substantially identical to the answer of the United States and the Interstate Commerce Commission and likewise did not deny the factual allegations of the complaint.

Thereafter, on March 28, 1960, the intervening railroads notified the Commission of the withdrawal of their Fourth Section Application. On March 31, 1960, the Commission permitted withdrawal of the application, without, however, vacating the order here involved.

The Commission and the railroads then moved to dismiss this proceeding, alleging that the withdrawal of the

Fourth Section Application had left no controversy before the Court below. The Court below sustained that motion on September 16, 1960.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.
Necessity For Obtaining Effective Judicial Review Of
Commission's "Temporary" Fourth Section Orders.

Thus this appeal is brought to obtain an effective judicial determination of the lawfulness of said order propriety of a practice recently much used by the railroads (and abetted by the Commission) in wresting away traffic from competing modes of transportation (particularly from these plaintiffs) without submitting the Commission's action to effective judicial review.

This practice is initiated by the railroads which publish water-competitive (and truck-competitive) rates for the avowed purpose of obtaining for the railroads traffic then moving by water. Such rates are made low enough to insure substantial, and often even the entire, diversion to the railroads of the affected traffic, and are lower for the competitive rail hauls than they are for non-competitive shorter rail hauls in the same direction over the same route. In the absence of authorization by the Commission, the lower rates for the longer competitive hauls are prohibited by Section 4 of the Interstate Commerce Act. The railroads therefore file an application to the Commission for authorization to charge such rates while maintaining the higher intermediate rates. This application is commonly called a fourth section application since the railroads are applying for relief from the prohibitions of Section 4.

If competing carriers regard the rates as substantially injurious, they (and often the shippers using the competing carriers' services) file with the Commission timely

protests pointing out one or more ways in which the railroad rates in question do not comply with statutory conditions and standards set forth in the Interstate Commerce Act for the grant of exception from the prohibition of Section 4, including detailed information in support of their position, and offering to introduce further evidence at a hearing. Over these protests the Commission in recent years has repeatedly authorized the promulgation of the protested rates by the railroads until further order of the Commission (by an order which the Commission calls "temporary" despite the fact that it may be two or more years before the further order is issued) and at the same time has set the application for hearing at some unspecified future date. Such orders, just as the one involved in this proceeding, have contained no findings to show that the authorized rates are compensatory, not destructively competitive or otherwise in accord with the requirements of Section 4, the National Transportation Policy and other provisions of the Interstate Commerce Act.

When the competitive carriers have appealed the matter to a court, the railroads have in at least three instances¹ withdrawn their fourth section applications and moved to dismiss the appeal as moot, preventing judicial review. In one case² a three-judge court vacated the "temporary" order, but the Commission appealed the decision to this Court. Before this Court could render any decision, the Commission entered a further order superseding its "temporary" order under review. On its suggestion its appeal was then apparently without objection, dismissed as moot.³

¹ *Coastwise Lines v. U.S.*, 157 F. Supp. 305, 306 (1957); *American Commercial Barge Line Company v. U.S.*, Civil No. 11772 (S.D. Tex., 1959) and this case.

² *Dixie Carriers v. U.S.*, 143 F. Supp. 844 (1956).

³ 355 U.S. 179 (1957).

In accordance with this Court's usual practice on appeals dismissed as moot, it instructed the three-judge court to vacate its order. The Commission has since that time refused to regard the three-judge court's opinion as a precedent, and has continued its practice of entering such temporary orders without findings to the continuing injury of these plaintiffs.

Thus, if these plaintiffs are not to have their traffic whittled away by a continuing series of orders by the Commission, none of which will ever be subject to any judicial review regarded as authoritative by the Commission, this Court must heed the plaintiffs' complaint of recurring injury by this continuing practice of the Commission.

This complaint of recurring injury was made in this case, whereas it was not made in the earlier cases referred to. By the time this case was filed the pattern of defeating judicial review by withdrawing the fourth section application (or entering a superseding order) had become established.

The rates complained of herein, the manner in which they are promulgated and used under so-called "temporary authority" until challenged in a court of law, and their subsequent withdrawal to frustrate judicial review, are part of what has become a consistent pattern of conduct which raises issues of great public importance in the area of public administration and regulation. The rates themselves vitally affect the keenly competitive relations between barge line operators (as well as other common carriers regulated under the Interstate Commerce Act) and railroads serving similar areas.

The present efforts of the railroads to capture traffic moving by other forms of transportation is a repetition

of similar practices which led to the enactment in 1887 of the Interstate Commerce Act. Rail carriers have from time to time engaged in ruinously destructive competition with water carriers where their services paralleled. The chief weapon of the rail carrier in this competition was, of course, drastically reduced rates on competing traffic, regardless of whether such rates were compensatory. Shippers over other parts of the rail carriers' lines were forced to subsidize this competition by higher rates. It was frequently the result of such juggled rates that shippers sending their freight in the same direction on long hauls through territory affected by such competition, could secure a lower total rate than short haul shippers over those portions of the same routes that were not affected by such competition. The result (successful from the rail carriers' point of view) of such destructive competition was the elimination of water carriers, and subsequent imposition of substantially higher rail rates overall. This history of the Interstate Commerce Act is detailed in the concurring report of Commissioner Eastman, then Chairman of the Commission at 194 I.C.C. 44 *et seq.*

This form of competition was a well understood phenomenon of the 1880's when Congress wrote into the Interstate Commerce Act the so-called long-and-short-haul clause (49 U.S.C. § 4). That clause was expressly designed to combat the more flagrant abuses of unfairly discriminatory rail rate-making which had so often worked to the extreme disadvantage of water transportation and short haul shipper alike. Section 4, as amended in 1910, reads in pertinent part substantially as follows:

“4. Long and short haul charges; competition with water routes.

(1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to

charge or receive any greater compensation in the aggregate for the transportation of * * * like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: * * *

Invalidity of These Commission Fourth Section Orders Which Contain No Findings and Are Entered Before Hearings Are Held.

It will be noted that this section directly prohibits, in the absence of prior Commission approval which may be given only in accordance with conditions and standards of the Act and of the National Transportation Policy, rates which provide for a greater compensation in the aggregate for the transportation of property "for a shorter than a longer distance over the same line or route in the same direction, the shorter being included within the longer."

When, as in this case, the railroads present for Commission approval lower rates for longer water competitive hauls (lower than for their shorter, non-water competitive hauls) otherwise prohibited by the Fourth Sec.

tion of the Act, the Commission is required, as a predicate for the authorization of such abnormal rates, to find the existence of a "special case" warranting departure from the long-and short-haul principle which the Act makes otherwise imperative and universal. *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914).

When further, as here the Commission in the order authorizing a departure rate expressly does not approve such rates and orders a hearing, it is obviously not in possession of the facts to find that a "special case" exists or that the rates are compensatory, and not destructively competitive as required by Section 4. Further, it does not find (because it does not have enough information to find) that the rates preserve the inherent advantages of competing forms of transportation. Yet such findings are required by the National Transportation Policy. *I.C.C. v. A. L. Meckling Barge Lines Inc.*, 330 U.S. 567, 574, 577, 579-580 (1947).

Nevertheless the Commission has adopted (with the cooperation of the railroads) a consistent practice of entering "temporary" orders allowing, over protest, Fourth Section departures which it expressly states it does not approve, without hearing and without findings. Orders affirmatively authorizing rates without findings are clearly unlawful. *Florida v. U.S.*, 282 U.S. 194, 212, 215 (1931); *U.S. v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 294 U.S. 489, 504-505 (1935). Yet under this practice the plaintiffs have had either to submit to loss of their business until the Commission entered a further order in the case some two or three years later, or to incur the expense of going into court each time to seek to set aside the "temporary" order immediately involved, but without hope of obtaining any protection against a repetition of like injury immediately thereafter.

Courts Retain Jurisdiction Over Controversies in Which Recurring Injuries Are Alleged Even After the Injury Immediately Complained of Ceases.

This Court, as well as other courts, has often held that such a pattern of recurring injurious acts is good reason for retaining jurisdiction of a proceeding brought to review one of them after the act has ceased through no connivance of the plaintiff. Two of the first of these decisions involved this Commission. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911); *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433, 452 (1911); *U.S. v. W. T. Grant Co.*, 345 U.S. 629 (1953); *McGrain v. Daugherty*, 273 U.S. 135, 180-182 (1927); *Boise City Irrigation & Land Co. v. Clark*, 131 Fed. 415 (9th Cir., 1904); *Walling v. Haile Gold Mines*, 136 F.2d 102 (4th Cir., 1943); *Papaliolios v. Durning*, 175 F.2d 73 (2d Cir., 1949); *Gay Union Corporation v. Wallace*, 112 F.2d 192 (D.C. Cir., 1940), cert. den., 310 U.S. 647; *Dyer v. Securities & Exchange Commission*, 266 F.2d 33, 46-47 (8th Cir., 1959), cert. den., 361 U.S. 835 see also *Diamond, Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 136 (1946).

In most of the cases cited, the particular act originally complained of had lost all effectiveness to injure the plaintiffs. In the instant case, Fourth Section Order No. 19059 has not been vacated (only the railroads' fourth section applications were withdrawn) and the order complained of still stands as the railroads' sole authorization for having assessed rates, which without such authorizations are clearly unlawful. The order stands as a present defense to any proceeding by these plaintiffs against the intervening railroads for their damages caused by the railroads' assessment of rates which were unlawful without that authorization, since the lawfulness of Fourth

Section Order No. 19059 can not be attacked collaterally. *Venner v. Michigan Central Railroad Co.*, 271 U.S. 127, 130 (1926); *Callahan Road Company v. United States*, 345 U.S. 507, 512-513 (1953); *Simpson v. Southwestern Railroad Co.*, 231 F.2d 59, 62 (5th Cir., 1956), cert. den., 352 U.S. 828.

The court below relied upon three decisions by this Court which involved no question of a recurring pattern of behavior by the defendants to the repeated injury of the plaintiffs. In *Mills v. Green*, 159 U.S. 651 (1895), the plaintiff complained that he was unconstitutionally to be prevented from voting for a delegate to a constitutional convention. The convention had convened before he perfected his appeal. There was no allegation that he had been or would be prevented from voting in other such elections.

In *Amalgamated Association of Street Etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 416 (1951) this Court refused to review an award after the dispute concerning it had been settled by the parties, and the time limit in the award itself had expired. Despite this settlement by the parties, however, this Court retained jurisdiction of a companion case (its Docket No. 329) arising from the same labor dispute to determine the validity of a "perpetual" injunction against a strike by a public utility's employees issued by a state court during the course of the dispute, and in its opinion in the companion case held unconstitutional Wisconsin's law which was under attack in both cases. *Amalgamated Association of Street etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).

In *Local No. 8-6, Oil, etc. Union v. Missouri*, 361 U.S. 363 (1960) the limitation by statute of the right to strike in a labor dispute with a public utility was again involved.

The dispute had been settled before any appeal was perfected to this Court, but the plaintiff asked this Court to rule on the constitutionality of Missouri's statute solely because the case was the first one which had arisen under the statute, and it was anticipated that at some future date other cases might arise under the law. Clearly there was no recurring pattern or even imminent prospect of further injury to the unions who were the plaintiffs.

The Court below further relied on this Court's dismissal as moot of *Atchison, Topeka & Santa Fe Railway Co. v. Dixie Carriers*, 355 U.S. 179 (1957) and *United States v. Amarillo-Borger Express*, 352 U.S. 1028 (1957) even though those cases did not involve any allegation of a recurring pattern of injury. Thus the court below has not regarded those authorities which dealt with factual situations like the one here involved.

The Commission should not be permitted to continue its practice of entering on protested fourth section applications such "temporary" authority orders without hearing or findings in the absence of review of such practice by this Court. This practice is making substantial changes in the means of transportation used in the United States. Ultimately this practice must affect the very survival of those means of transportation which compete with the railroads. The railroads with their enormously larger capital investments are the only carriers which can effectively use this kind of hit-and-run rate-making as a competitive weapon against other forms of transportation. These questions should be considered by this Court only upon full briefs by the parties.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A.

**UNITED STATES DISTRICT COURT
Eastern District of Missouri
Eastern Division**

Cargill, Incorporated, a corporation,
et al.,

Plaintiffs,

vs.

United States of America and Inter-
state Commerce Commission,

} No. 59 C 335 (3)

Defendants,

The Pennsylvania Railroad Company,
et al.,

Intervening Defendants.

Before M. C. Matthes, Circuit Judge, Ray W. Harper,
Chief Judge, and Randolph M. Weber, District Judge.

PER CURIAM.

Plaintiffs are barge line operators. They commenced this action on November 16, 1959, against the United States of America and the Interstate Commerce Commission seeking an injunction of the Commission's Fourth Section order No. 19059, entered January 9, 1959, and for a declaratory judgment. They are in competition with various railroads which can be classified into two groups: one, the eastern group which has trunk lines from Chicago, Illinois, to the east and with proportional or re-shipping rates for long hauls and, two, the western group which has lines serving west of Chicago and with short haul rates that are higher than the eastern long haul rates. These railroads were granted leave to intervene.

District Courts have jurisdiction of actions to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission, §1336, Title 28, U.S.C., and the action has been brought in the judicial district of parties plaintiff as provided by §1398,

Title 28, U.S.C. A three-judge court was duly composed under the provisions of §§2284 and 2321-2325, Title 28, U.S.C. Motions to Dismiss were filed by defendants and intervenors challenging plaintiffs' Petition on the grounds of mootness and that declaratory judgment relief would not lie. These Motions were orally heard, supporting memoranda filed and the matter taken under submission.

The actions of the interstate Commerce Commission for which plaintiffs seek relief in this suit involve the matter wherein the intervenors published rates with the Commission in which combination (long haul) rates were lower than local (short haul) rates and relief was sought under Section Four of the Interstate Commerce Act.¹ The proceeding was entitled "Grain and Grain Products from Illinois to the East" and the plaintiffs here filed their protests.

The order of the Commission provided that the rates described in the application would become effective January 10, 1959, that they were subject to the Commission's investigation and approval, could not be increased unless authorized and the investigation would be made "with a view to making such findings and orders in the premises as the facts and circumstances shall

¹ §4, Title 49, U.S.C., provides that "it shall be unlawful for any common carrier *** to charge or receive any greater compensation in the aggregate * * *, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * *: Provided, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized * * * to charge less for longer than for shorter distances * * *, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it * * *, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; * * *." (Emphasis supplied.)

warrant." The matter was assigned for hearing at a time and place thereafter to be fixed and the intervenors here were permitted to become respondents to the proceedings.

Plaintiffs contend in this action that the establishment of rates, pending the hearing on the Section Four application and prior to actual investigation, hearing and finding of facts, amounts to an avoidance of the prohibitions contained in Section Four, which make it unlawful to charge or receive such rates. They say that such establishment of rates amounts to the granting of a "temporary rate" and is void and unlawful, arbitrary and capricious, thus depriving them of their property without due process of law and violative of the Fifth Amendment to the Constitution. On the declaratory judgment side, plaintiffs contend that this procedure is a continuous practice by the Interstate Commerce Commission; that the Commission thus establishes a rate without support by adequate findings from which it can be determined if the facts constitute a special case and if the rates are reasonably compensatory, all as required by Section Four; and that the Commission will probably enter a final order of dismissal to make the matter "moot" before this Court can hear and decide the issues and that such practice, too, has been followed in the past and is continuing to plaintiffs' damage.

The defendants and intervenors point out that the rail carriers did notify the Commission on March 28, 1960, of the withdrawal of their Section Four Application and requested cancellation of the Commission's temporary orders.¹ The Commission acted upon this notification on March 31, 1960, and the application was permitted to be withdrawn. They further state that the Commission records show that a new schedule of rates has been filed, reducing the local haul charges to where, in the aggregate, they will not exceed the long haul charges, and therefore, there is no further relief being sought, nor can it be given, under Section Four and the matter is "moot".

¹ The court is mistaken. The railroads did not so request and the Commission did not cancel the orders. Footnote added by Appellants.

Plaintiffs, however, contend that this is a continuing practice of the Commission which results to their damage and say that this should remove the matter from the realm of mootness. They want this Court to not only enjoin and hold unlawful the Section Four order but to also declare the practice improper.

It is the duty of this Court to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653. This principle was recently restated by the Supreme Court in the case of *Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri*, 361 U.S. 363. In this latter case an injunction had been granted against a union under authority of a Missouri statute; the Supreme Court of Missouri held the statute constitutional and certiorari was granted to the Supreme Court of the United States; in the meantime the injunction had expired and in deciding the matter the Court said at l.c. 367: "• • • we cannot escape the conclusion that there remains for this Court no 'actual matters in controversy essential to the decision of the particular case before it.' *United States v. Alaska S. S. Co.*, 253 U.S. 113, 116.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Assoc. v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 416, 418. The very proposition here was involved in two recent decisions wherein the Supreme Court of the United States remanded three-judge court opinions with directions to dismiss for mootness. See *A.T. & S.F. R. Co. v. Dixie Carriers, Inc.*, 143 F.Supp. 844, 355 U.S. 179, and *Amarillo-Borger Express v. United States*, 138 F. Supp. 411, 352 U.S. 1028.

The same reasoning applies to the prayer for declaratory judgment relief. Section 2201, Title 28, U.S.C., creates a remedy "In a case of actual controversy within its jurisdiction, • • •."

There is nothing pending in the case before us. The chance of any controversy that existed has been terminated by dismissal. To lay down rules of practice for future guidance of the Commission would be nothing more than the substitution of judicial for executive administration. The Judiciary must confine itself within the constitutional and legislative grants of authority to review, determine or declare rights only where actual controversies exist. As said in *Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri, supra*, at l.c. 396: "To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain."

For the reasons stated, defendants' and intervenors' Motions to Dismiss should be sustained and an Order will be entered to that effect.

APPENDIX B.

**UNITED STATES DISTRICT COURT
Eastern District of Missouri
Eastern Division**

**Cargill, Incorporated, a corporation,
et al.,**

Plaintiffs,

vs.

**United States of America and Inter-
state Commerce Commission,**

Defendants,

**The Pennsylvania Railroad Company,
et al.,**

Intervening Defendants.

No. 59 C 335 (3)

ORDER

This cause was presented to the Court upon Motions to Dismiss filed by defendants and intervenors. Oral argument was heard, memoranda filed, and the matter taken under submission. The Court being fully advised in the premises, files its per curiam opinion and in accordance therewith, it is

ORDERED that defendants' and intervenors' Motions to Dismiss be and the same are hereby sustained and plaintiffs' Complaint is dismissed and the relief therein prayed for denied.

Done this 16th day of September, 1960.

/s/ **M. C. Matthes**
Judge, United States Court of
Appeals

/s/ **Roy W. Harper**
Judge, United States District Court

/s/ **Randolph M. Weber**
Judge, United States District Court

APPENDIX C.

Fourth Section Order No. 19059

ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D.C., on the 9th day of January, A. D. 1959

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35140, as amended, filed by the Traffic Executive Association—Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 (Hinsch series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, which application, as amended, is hereby referred to and made a part hereof:

It is ordered, That, effective January 10, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35140, as amended, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in carloads, as described in the application, from points in northern Illinois named in Appendix "C" of the application to points in central, trunk line, and New England territories, rates constructed on the basis described in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as

may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Division 2.

Harold D. McCoy,

Secretary.

(Seal)

APPENDIX D.

Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D.C., on the 17th day of July, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35507, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 (Hinsch series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, which applications and order are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered as aforesaid, be, and it is hereby, modified and amended by adding thereto the following paragraph:

It is further ordered, That, effective July 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35507, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, and soybeans, and their products, in carloads, as more fully described in the application, from points in northern Illinois to points in central, trunk-

line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2,

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX E.

Second Supplemental Fourth Section Order No. 19059

ORDER

**At a Session of the Interstate Commerce Commission,
Fourth Section Board, held at its office in Washington,
D.C., on the 7th day of August, A. D. 1959.**

**GRAIN AND CRAIN PRODUCTS FROM
ILLINOIS TO THE EAST.**

(From Wisconsin)

Upon consideration of the matters and things involved in fourth-section application No. 35559, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental order No. 19059, entered July 17, 1959, in application No. 35507, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered, modified, and amended as aforesaid, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, effective August 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35559, applicants therein be, and they are hereby,

authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in earloads, as more fully described in the application, to points in central, trunk line, and New England territories, from (A) points in Illinois and Wisconsin, when routed by way of Chicago, Ill., or points in the Chicago switching district, Kewaunee, and Milwaukee, Wis., or Milwaukee terminal stations, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX F.

Third Supplemental Fourth Section Order No. 19059

ORDER

**At a Session of the Interstate Commerce Commission,
Fourth Section Board, held at its office in Washington,
D.C., on the 10th day of September, A. D. 1959.**

**GRAIN AND GRAIN PRODUCTS FROM
ILLINOIS TO THE EAST.**

Upon consideration of the matters and things involved in fourth-section application No. 35623, filed by The New York Central Railroad Company for itself and on behalf of the carriers parties to its tariff I.C.C. 1169, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered, modified, and amended as aforesaid, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, effective September 15, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35623, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in car-

loads, as more fully described in the application, from points in Illinois on The New York Central Railroad Company to points in central, trunk line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX G.

The National Transportation Policy Act of September 18, 1940 c. 722 Title I §1, 54 Stat. 899, note preceding the Interstate Commerce Act, 49 U.S.C.:

National transportation policy. Act Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12, 13 and 19 of this title, by inserting before Part 1 thereof (Chapter 1 of this title) the following provision entitled "National Transportation Policy": "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 4 of the Interstate Commerce Act. Feb. 4, 1887, c. 104, Pt. I, § 4, 24 Stat. 380; June 18, 1910, c. 309, § 8, 36 Stat. 547; Feb. 28, 1920, c. 91, § 406, 41 Stat. 480; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 6(a), 54 Stat. 904; July 11, 1957, Pub.L. 85-99, 71 Stat. 292, 49 U.S.C. 34:

§ 4. Long and short haul charges; competition with water routes

Charges for long and short hauls and on through route

(1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence:

Provided further, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive Points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

**Competition of railroads with water routes;
change of rates**

(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Section 10 of the Administrative Procedure Act, June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U.S.C. § 1009:

§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Interstate Commerce Commission Orders, Enforcement and Review Act of June 25, 1948, c. 646, § 1, 62 Stat. 969, amended May 24, 1949, c. 139, § 115, 63 Stat. 105, 28 U.S.C. § 2321:

§ 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

Declaratory Judgment Act, June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12 (p), 72 Stat. 349, 28 U.S.C. § 2201 and 2202:

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948 c. 646, 62 Stat. 964.

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JAMES B. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~207~~ 41

A. L. MECHLING BARGE LINES, INC., MISSISSIPPI
VALLEY BARGE LINE COMPANY, THE OHIO
RIVER COMPANY, AND BLASKE, INC.,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION,

Defendants-Appellees,

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Intervening Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

MOTION TO AFFIRM.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1960.

No. 667.

A. L. MECHLING BARGE LINES, INC., MISSISSIPPI
VALLEY BARGE LINE COMPANY, THE OHIO
RIVER COMPANY, AND BLASKE, INC.,

Plaintiffs-Appellants.

vs.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION,

Defendants-Appellees,

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Intervening Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

MOTION TO AFFIRM.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, The Pennsylvania Railroad Company, and other intervening railroad defendants—appellees, as shown in Appendix A hereto attached, in the District Court move that the judgment of that Court be affirmed on the ground that the matters involved are moot and do not present a substantial question for review.

This proceeding involves a direct appeal from the judgment of the three-judge United States District Court for the Eastern District of Missouri, Eastern Division, entered September 16, 1960. That Court granted defendants' and intervening defendants' Motions to Dismiss on the grounds of mootness, dismissed plaintiffs' complaint and denied the relief therein sought.

STATEMENT OF THE CASE.

Appellants before the three-judge court sought (1) to enjoin, set aside, annul and suspend the fourth section order of the Commission, and (2) to enter a declaratory judgment upon certain questions of law. The Fourth Section Order No. 19059, as supplemented, granted the applicant railroads temporary authority to maintain lower rates from certain Illinois and Wisconsin origins to the East than the rates maintained from intermediate origins to the same destinations. On March 28, 1960, applicant railroads advised the Commission and all interested parties that applicants had published effective March 10, 1960, reduced rates from the intermediate origins which made unnecessary the relief granted by Fourth Section Order No. 19059, as supplemented. By notice dated March 31, 1960, the Commission advised that the applications were considered withdrawn. There are therefore no longer outstanding fourth-section departures and the temporary fourth section authority and Fourth Section Order No. 19059, as supplemented, are no longer effective. As pointed out in *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 567 (1918), where carriers' rates do not conform with Section 4 of the Act, they may, at their option, "keep in effect the low rate from the more distant point by lowering the rates to intermediate points." This the railroads have done. The result of their action is to terminate all controversy between the parties relating to Section 4 of the Inter-

state Commerce Act, 49 U. S. C. § 4. Motions to Dismiss were filed by defendants and intervening defendants, appellees, on the grounds of mootness and that declaratory judgment relief would not lie. The three-judge district court unanimously sustained defendants' and intervenors' Motions to Dismiss. The court concluded that the cause of any controversy that existed has been terminated by the publishing of rates that fully conformed in all respects to the requirements of Section 4 of the Interstate Commerce Act, 49 U. S. C. § 4.

STATEMENT IN SUPPORT OF MOTION TO AFFIRM.

The order which plaintiffs seek to enjoin has ceased to be effective and the relief thereunder cannot be reinstated. *Vicksburg, Shreveport & Pacific Railway v. Anderson-Tully Co.*, 256 U. S. 408, 416 (1920); *Lime From C. F. A. Territory & Southwest to Boutte, La.*, 294 I. C. C. 616, 618 (1955); *Maggioni & Co. v. Atlantic Coast Line Railroad*, 272 I. C. C. 127, 131 (1948). The issue of an injunction has been thereby rendered moot. *Dixie Carriers, Inc. v. United States*, 355 U. S. 179 (1957); *Arkansas & Louisiana Missouri Railway Co. v. Amarillo-Borger Express, Inc.*, 352 U. S. 1028 (1957); *Coastwise Lines v. United States*, 157 F. Supp 305, 306 (1957). As pointed out by the three-judge court, plaintiffs recognized, in paragraph 19 of the complaint, that cessation of the temporary relief would render the injunction moot.

The questions which appellants seek to make the subject of a declaratory judgment do not involve an actual controversy. Regardless of whether an "actual controversy" had existed with respect to the particular commission action here under review, clearly such controversy terminated upon the withdrawal of the applications and discontinuance of the temporary authority. However convenient appellants might deem it for them, the court is not empowered to de-

raise moot questions or abstract propositions for the government of future cases which cannot affect the result as to the matter in issue in the case before it. *Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri*, 361 U. S. 363, 367 (1960); *Utah v. Wycoff Co.*, 344 U. S. 237, 243-245 (1952); *Amalgamated Association v. Wisconsin Emp. Rel. Bd.*, 340 U. S. 416, 418 (1951); *United States v. Alaska Steamship Co.*, 253 U. S. 113, 116 (1919); *Mills v. Green*, 159 U. S. 651, 653 (1895); *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 314 (1892).

In *Electric Bond & S. Co. v. Securities & Exchange Comm.*, 303 U. S. 419, 443 (1937), the Court declined speculative inquiry into a variety of hypothetical controversies which may never become real stating that "Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts." *International L. & W. Union v. Boyd*, 347 U. S. 222, 223-224 (1953); *Barker Painting Co. v. Brotherhood of Painters, Decorators and Paperhangers*, 281 U. S. 462, 463-464 (1929).

Appellants suggest that three of the decisions relied on by the court below were not relevant since, they contend, the cases "involved no question of a recurring pattern of behavior." *Mills v. Green*, 159 U. S. 651 (1895), clearly supports the proposition for which it was cited, i.e., it is the duty of the Court "to decide actual controversies * * * , and not to give opinions upon moot questions or abstract propositions, or to decide principles or rules of law which cannot affect the matter in issue in the case before it." In *Amalgamated Association of Street Etc. Employees v. Wisconsin Employment Relations Board*, 340 U. S. 416 (1951), it was urged that the questions should be decided even though moot because of their importance but the Court

reaffirmed its position that "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." The "so-called" companion case, *Amalgamated Association of Street Etc. Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951), involved a "perpetual" injunction which clearly had a continuing affect on the rights of the parties involved. In *Local No. 8-6, Oil, etc. Union v. Missouri*, 361 U. S. 363 (1960), as in *Harris v. Battle*, 348 U. S. 803 (1954), cited as controlling in that case, the "recurring" nature is similar to that alleged by plaintiff in the immediate case. In the *Harris* case, *supra*, the alleged "continuing threat of state seizure in future disputes" may be likened to the alleged issuance of "fourth section orders" by the Commission pursuant to future applications.

In support of their contention that the issues in this proceeding have not become moot, appellants rely in their Jurisdictional Statement on decisions which do not support their position. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498 (1911), and *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433 (1911) involve maximum rate orders of that Commission. By statute, at that time, orders of the Commission were limited to a two year duration. It was the practice of the Commission, when necessary, to reinstate the order after the two years. The Court pointed out that consideration of such an issue ought not to be, as they might be, defeated by short term orders, capable of repetition. In those cases, the very subject matter, i. e., the same involved rate, was capable of being the subject of recurring orders. This is the case in all the proceedings cited by appellant. For example, in *McGrain v. Daugherty*, 273 U. S. 135 (1927), the subject matter of the proceeding, i. e., the activities of a select committee of the Senate, were merely sus-

pended pending a decision in that case. The Court observed that the committee may be revived or continued by motion to that effect; that this being so, and the Senate being a continuing body, the case could not become moot in the ordinary sense.

Likewise, in *Dyer v. Securities & Exchange Commission*, 266 F. 2d 33, 41, 46 (8th Cir., 1959), cert. den., 361 U. S. 835 (1960), the Rules of the Securities & Exchange Commission provided that stockholder proposals, if they receive less than 3% of the votes cast, may be omitted from the proxy material for three calendar years. Thus the Commission's allowance of the voting of the involved proxies would have a continuing effect beyond the particular year cast.

If in another proceeding involving other carriers, other commodities, other rates and other orders, appellants feel that their rights have been violated and an order of the Commission is invalid, they have available to them at that time the statutory right to seek injunctive relief which, if granted, would prevent the operation of the Commission order as provided in Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009(d) and 28 U. S. C. § 2321 set forth in Appendix G, Jurisdictional Statement. Plaintiffs-appellants have indeed utilized this procedure in other cases. See *Corn and Corn Products, Illinois to Official Territory*, 310 I. C. C. 437, 438 (1960).

CONCLUSION.

Wherefore, the intervening defendants-appellees respectfully submit that the matters in this cause have been rendered moot, no actual controversy exists upon which a declaratory judgment may be entertained and do not present a substantial question for review and the decree of three-judge district court should be affirmed.

Respectfully submitted,

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JAMES M. SOUBY, JR.,
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JAMES E. STEFFARUD,
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February, 1961.

PROOF OF SERVICE.

I, James E. Steffarud, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 17th day of February, 1961, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

- (1) On the United States of America by mailing copies in duly addressed envelopes with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C., to Robert A. Bicks, Assistant Attorney General; John H. D. Wigger, Attorney, same address, and William H. Webster, United States Attorney, St. Louis 1, Missouri.
- (2) On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and to H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.
- (3) On the plaintiffs-appellants by mailing copies in duly addressed envelopes with first class postage prepaid to their attorneys of record, Wilbur S. Legg and Edward B. Hayes, 135 South La Salle St., Chicago 3, Illinois.

JAMES E. STEFFARUD.

APPENDIX A.

The Railroad Intervening Defendants-Appellees are as follows:

The Atchison, Topeka and Santa Fe Railway Company.
The Baltimore and Ohio Railroad Company.
The Chesapeake and Ohio Railroad Company.
Chicago and North Western Railway Company.
Chicago, Great Western Railway.
Chicago, Burlington & Quincy Railroad Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad.
Chicago, Rock Island and Pacific Railroad Company.
Erie Railroad Company.
Grand Trunk Railway System.
Gulf, Mobile and Ohio Railroad.
Illinois Central Railroad.
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The Pennsylvania Railroad Company.
Wabash Railroad Company.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 667

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on September 16, 1960, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing appellants' complaint as moot. Appellants sought to set aside and enjoin an order of the Commission, originally issued on January 9, 1959 (J.S. 7a-8a), and amended several times thereafter (J.S. 9a-14a), granting the intervening rail carriers tem-

porary authority under Section 4(1) of the Interstate Commerce Act, 49 U.S.C. 4(1), to operate in a manner inconsistent with the long and short haul provisions of that section pending a hearing on the railroads' application for permanent relief from its requirements. In addition the appellants sought declaratory relief, under the Declaratory Judgment Act, 28 U.S.C. 2201, and the Administrative Procedure Act, 5 U.S.C. 1009, with respect to the general authority of the Commission to enter temporary Section 4 orders without making the investigation or findings of fact which they alleged to be required prior to the grant of any Section 4 relief. The three-judge district court dismissed the case as moot upon being advised that the Commission had approved the railroads' withdrawal of their Section 4 application subsequent to a revision of their tariffs to lower the intermediate rates and thus eliminate the long-short haul differential which had originally necessitated the application.

The controversy relates to the rates charged by various groups of railroads for the shipment of grain from northern Illinois. In December, 1958, tariffs lowering the long haul rates for transporting this grain were filed with the Commission, to become effective, unless suspended, on January 10, 1959. Since the rates to various intermediate points were not also being reduced, applications for relief from the requirements of Section 4 of the Act were simultaneously filed with the Commission. These latter applications were opposed by the appellants and their representatives, and objections were also raised to the

reasonableness of the proposed rates. On January 9, 1959, the Commission (Division 2), though refusing to suspend the tariffs, instituted an investigation into the lawfulness of the rates, and simultaneously issued the temporary Section 4 order here in issue. The rate investigation and the fourth section application were consolidated for hearing.

On November 16, 1959, while the case was still pending in hearing status, the appellants brought this action in the district court. Prior to the hearing in the three-judge court the rail carriers published new tariffs, effective March 10, 1960, which, by reducing the rates for grain from and to the intermediate points to the same level applicable between the terminal points, removed the disparity prohibited by Section 4 in the absence of special Commission approval.¹ Accordingly, on March 28, 1960, the rail carriers withdrew their Section 4 applications and on March 31, 1960, the Commission acknowledged the withdrawal (J.S. 3a). These facts were brought to the district court's attention by motions to dismiss, and on September 16, 1960, it issued its *per curiam* opinion (J.S. 1a-5a) and order (J.S. 6a) here under review dismissing the cause as moot.

ARGUMENT

While the jurisdictional statement discusses a number of questions relating to the adequacy of the Commission's order granting temporary relief from

¹ See *Skinner & Eddy Corp. v. United States*, 240 U.S. 557, 564.

the long and short haul requirements of Section 4 of the Interstate Commerce Act (J.S. 3-4, 12-14), the only questions decided below are those relating to the district court's jurisdiction to entertain the action in the light of the railroads' withdrawal of their Section 4 application. The district court's conclusion that no case or controversy calling for the exercise of its judicial functions existed after the withdrawal of the Section 4 applications was correct and no question warranting plenary review by this Court is presented by the appeal.

1. Appellants do not and cannot contend that they have any present interest in the temporary Section 4 order issued by the Commission on January 9, 1959, the validity of which they challenged in the court below. As appellants note (J.S. 8), the order has never technically been cancelled, but it was applicable only during the period of the Commission's consideration of fourth section application No. 35140 (J.S. 7a), and with the latter's withdrawal ceased to have any effect. Were any of the railroads to file new tariffs requiring relief under Section 4, they would have to secure new approval from the Commission on the basis of the facts then existing. Moreover, since none of the appellants here are shippers, there can be no question as to damages for violation of Section 4 of the Act, even assuming *arguendo* that damages would lie where the Commission grants an application for relief from the requirements of Section 4, but does so in an allegedly defective manner. There is thus nothing about the order which might warrant further re-

view proceedings, after the particular order has terminated, on the ground that the situation created by its adoption continues to exist. Cf. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498.

2. Recognizing that in an almost identical situation this Court dismissed an appeal as moot (*Atchison, Topeka & Santa Fe Railway Co. v. Dixie Carriers*, 355 U.S. 179; ¹ see also *United States v. Amarillo-Borger Express*, 352 U.S. 1028), appellants argue that the present case is distinguishable because they are also seeking declaratory relief, i.e., a court determination that the allegedly consistent practice of the Commission in issuing temporary Section 4 orders without adequate investigation or findings is contrary to law. But, as the district court pointed out (J.S. 4a-5a), the right of a court to render declaratory judgments depends upon the continuing existence of a case or controversy. With the withdrawal of the Section 4 application here "the chance of any controversy that existed has been terminated" (J.S. 5a). "To lay down rules of practice for future guidance of the Commission" (*ibid.*) would be to give an advisory opinion on an abstract question of law, which the federal courts are "without power" to do. *Amalgamated Association of Street, Etc., Employees v. Wisconsin Employment Relations Board*, 340 U.S. 416, 418; see

¹ In *Dixie Carriers* the Commission had granted temporary relief from Section 4, as here, but had initially suspended the rates, an action it rescinded on rehearing. The district court held

*Local No. 8-6, Oil, Chemical and Atomic Workers
Unions v. Missouri*, 361 U.S. 363, 367.*

The proceeding involved in this case presents a classic situation for application of the general rule on mootness. There was nothing before the court below indicative of the extent or nature of the alleged Commission policy and it would be a fruitless task to attempt an advance determination of the investigation and findings, if any, which would be necessary to justify temporary Section 4 relief in all future situations. Nor is there anything demonstrating that the appellants here have any real interest in such a determination. Certainly the rail carriers' reduction of their intermediate rates some 15 months after the entry of the challenged order, and their consequent withdrawal of the Section 4 application, does not indicate any general or repeated pattern of attempting to secure unreviewable short term advantages over

that both the recession of the suspension and the grant of the temporary Section 4 relief were void. This Court noted probable jurisdiction to review both determinations, but before filing of briefs the Commission completed its investigation and set aside the rates. The Court then dismissed the case as moot.

*While appellants seek to invoke the Declaratory Judgment Act, 28 U.S.C. 2201-02, as an alternative to review under the Urgent Deficiencies Act of 1913, 28 U.S.C. 2331-35, it is clear that the Declaratory Judgment Act cannot be used as a substitute for the statutory methods of review applicable to orders of the Commission. *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237, 246; *Charles Nooding Trucking Co. v. United States*, 29 F. Supp. 537-54 (D.N.J.).

competing methods of transportation,' a practice which the Commission would be fully equipped to prevent if it in fact developed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal presents no substantial question, and that the judgment of the district court should be affirmed.

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MARCH 1961.

* In the two other cases cited by appellants (J.S. 10) to show a pattern of railroad conduct to secure temporary Section 4 orders and then avoid a court challenge by withdrawing the applications, the district court had issued temporary restraining orders enjoining the effectiveness of both the temporary Section 4 orders and the underlying tariffs, and the cases became moot when the railroads subsequently filed new tariffs not involving any Section 4 question.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. ~~67~~ 41

A. L. MECHLING BARGE LINES INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court
For The Eastern District Of Missouri,
Eastern Division

REPLY TO MOTIONS TO AFFIRM.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960.

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No. 667
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A. L. MECHLING BARGE LINES INC., ET AL.,
Appellants,
v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court
For The Eastern District Of Missouri,
Eastern Division

—
REPLY TO MOTIONS TO AFFIRM.
—

Pursuant to Rule 16(3) of the Revised Rules of this Court, appellants file this single reply to the respective Motions to Affirm filed by the intervening appellees on February 20, 1961, and the Commission by the Solicitor General on March 2, 1961. Counsel for appellants received the latter Motion to Affirm by air mail on March 6, 1961.

ARGUMENT.

Introduction.

The motions to affirm depend on certain assumptions:

Appellees would pass *sub silentio* the illegality of the Commission's admitted practice of entering these rate orders without any findings whatever, and boldly assume that when, as here it is duly alleged that a practice is followed to the injury of parties who complain of it, and also of a specific instance thereof, the defendants-appellees may frustrate judicial power and persist at will in the practice that is challenged as unlawful by merely suspending it as to the particular instance.

"Two months after the complaint was filed, but before the case came on for trial, respondent discontinued the use of these contracts and substituted different compensation plans not now before us. * * * Despite respondent's voluntary cessation of the illegal conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power."

Walling v. Helmerich & Payne, 323 U. S. 37, 43 (1944).

"The interests there passed on are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached, and that the Government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy or terminate its questions."

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 516 (1911).

Secondly, appellees assume that the specific *instance* of the illegal practice alleged, *viz.*, the Commission's Order F.S.O. 19059, has now no possible effect, an assumption that is both erroneous and curiously inconsistent with their action in not vacating that order (and in strenuously resisting its judicial review in this proceeding).

I. THE CONTROVERSY IS JUSTICIABLE.

Appellees would have it that this is "the classic case of mootness." That, however, would be the case of a sham controversy in which the parties only pretend to be in disagreement, such as *Lord v. Veazie*, 8 How. (49 U. S.) 250 (1850), referred to in *Walling v. Helmerich & Payne*, 323 U. S. 37, 43 (1944) quoted above. This is not the case, illustrated by appellees' citations, of a single instance of illegal conduct that has been voluntarily terminated, leaving no existing controversy for judicial power to decide. The complaint in this cause (par. 19) squarely alleges that "• • • the Commission still follows the practice of entering such orders without supporting findings." The answers of the Commission and of the intervening appellees do not deny that averment. The failure to deny the averment admits it. Fed. R. Civ. P. 8(d).

The decisions of this Court are clear that when, as here, the complaint is of an unlawful practice, as well as of an instance of it, the mere voluntary discontinuance (after suit brought) of the instance of the practice does not terminate the *controversy* nor oust judicial power. (*Walling v. Helmerich & Payne, supra*; *Southern Pacific Terminal Co. v. I.C.C., supra*) The Commission *admits on the pleadings* that it "still follows the practice," as above quoted. When, as here, the practice complained of as unlawful is a practice of a regulatory agency of the United States this Court emphasizes the consideration of public importance in rejecting any suggestion that

when one instance of the challenged practice lapses there is nothing left within the ambit of judicial power. *Southern Pacific Terminal Corporation v. Interstate Commerce Commission, supra.*

The grant of judicial power to decide "cases and controversies" in Article III of the Constitution of the United States does not require federal courts to permit private parties, or governmental agencies, freely to persist in an illegal practice, avoiding judicial review by suspending any instance of it before judicial challenge can be pushed to ultimate decision. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515-516 (1911); *Southern Pacific Company v. Interstate Commerce Commission*, 219 U.S. 433, 452 (1911); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 308; *Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944). Neither the Constitution, nor the Acts of Congress that submit the Commission to judicial review (which now include the Administrative Procedure Act, 5 U.S.C. §1001 *et seq.* and the Declaratory Judgment Act, 28 U.S.C. 2201) establishes any such no-man's-land for the unrestrained play of naked administrative power.

"The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." (Our emphasis)

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 515 (1911).

What redress have these appellant water carriers for injuries inflicted by the practice of entering these "temporary" rate orders without hearings or findings, a prac-

tice in which it is admitted on the pleadings that the Commission "still persists"—orders that are not susceptible of any collateral attack—and whose term, after being prolonged by administrative and judicial maneuver, is then abruptly ended in any instance when at last judicial determination appears imminent, without, however, redressing injuries they have inflicted, or vacating the orders, or abandoning the practice?

The Government's motion refers to the practice complained of, which is to enter "temporary" rate orders without any hearing or findings whatever, as "the alleged Commission policy." The "allegation" so referred to is that "the Commission *still persists* in the practice of entering such orders." (Complaint, par. 19). The Government would ignore the fact that the Commission's answer below did not deny that allegation. It is not only the "alleged" Commission policy—it is the admitted Commission policy.

The Government suggests (p. 6) that there was nothing before the lower court to show the "extent or nature" of that admitted practice. Its nature is fully disclosed in the description that the complaint gives of the particular instance; and the admitted averment is that the Commission still persists in the practice of entering such orders (Complaint, par. 19).

As to its extent, here is a practice in which, as admitted on the pleadings, the Commission persists. The case has not been tried. Evidence never belonged in pleadings, even before the Federal Rules of Civil Procedure. *Commissioner v. Livacoli*, 252 F. 2d 268, 272 (6th Cir. 1958); *Dunn v. J. P. Stevens & Co.*, 192 F. 2d 854, 855 (2d Cir. 1951); *Cater Construction Co., Inc. v. Nischwitz*, 111 F. 2d 971 (7th Cir. 1940).

Incidentally, other instances of the practice, one of them involving one of these appellants and this very grain traffic from northern Illinois insofar as it consisted of corn, were detailed in certain affidavits that appellants had presented in this case to the lower court in another connection.¹

As the affidavits also show, the Commission in that instance (referred to by the intervening appellees as *Corn & Corn Products, Illinois to Official Territory*, 310 L.C.C. 437, 438) prevailed upon a statutory three-judge court sitting in the 7th Circuit to dismiss that appellant's application for an injunction against that "temporary" order, for a supposed want of jurisdiction of the subject matter. The consequence is that a plaintiff forced to proceed in the Seventh Circuit cannot get an injunction there, although in two other circuits, contrary rulings have been made by three-judge courts. And as to those circuits the Government fails to comment on the unredressed injury of diverted traffic inflicted on the water carriers in those cases before the schedules were suspended or withdrawn. (Cf. *Seastrain Lines v. U. S.*, 168 F. Supp. 819 (S.D. N.Y. 1958).) In the three cases enumerated on page 10 of the Jurisdictional Statement, the applications were withdrawn. The permanent order in *Corn and Corn Products, Illinois to Official Territory*, *supra*, was entered about three years after the "temporary" order. Two or three-year periods are typical, of the effective duration of the Commission's "temporary" fourth section orders entered over protest, without hearing or findings.

These are matters of evidence; the case has not been tried. The complaint described the injurious and un-

¹ Appellants moved for a summary judgment. The motion was not ruled on.

lawful practice of the Commission, alleging that the Commission still persists therein, and the Commission's answer, which does not deny that averment, thereby admits that the Commission "still persists" in the practice complained of. In that situation the "controversy" continues, and there is no ouster of judicial power to look into the legality of that continued practice and all details of the situation which it creates. (Auth. cit.)

II. APPELLANTS HAVE A PRESENT INTEREST IN HAVING F. S. O. 19059 REVIEWED.

As has been shown, this case presents a continuing justiciable controversy even if the appellees' second mistaken assumption were correct, *viz.*, that the particular instance of the unlawful practice, (F.S.O. 19059) had lost all effect.

However, appellees do not deny that Order F.S.O. 19059 can be attacked only in this proceeding, brought for its direct review (and could not be collaterally attacked in an action for the damages inflicted by these unlawful rates, which that order unlawfully authorized). They do not deny, therefore, that this very order has the continuing effect of barring any attempt to effect such a recovery. (J. S. 15, 16) The Government suggests a doubt whether appellants, who are not shippers, could in any event recover the damages they suffered. (Motion, p. 4) If the suggested doubt were valid, that would further demonstrate that appellants are forever remediless for the injury suffered while these rates authorized by such "temporary" orders are in effect.

If, on the other hand, the suggested doubt is invalid, then the unlawful "temporary" order, so long as it stands unreviewed, bars a recovery that, in a subsequent action, appellants might otherwise be able to show they were entitled to have.

In either event, so long as that order remains un-reviewed, appellants could never get beyond that order or reach the question as to which the Government suggests doubt. The Government's doubts as to the merits of that question are collateral here. The obvious continuing effect of the order is conclusively to prevent appellants from submitting that question on its merits to an appropriate court.

This order has other continuing effect, as will appear. But before leaving this one, we note that the Government does not suggest that *shippers* could not recover their damages from rail rates which were unlawfully authorized without any findings of fact and made immediately effective before protests could be judicially reviewed. (Motion, 4) The statutory right of recovery given by Section 8 of the Interstate Commerce Act is not limited to *shippers*.

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Our emphasis) 49 U.S.C. Section 8.

The Government's suggestion that "the person or persons injured thereby" means "shippers only," is peculiarly indefensible when the illegality in question arises from the long and short haul provision of Section 4,

which was clearly enacted for the protection of the competing water carrier, as well as the higher-rated intermediate shipper. (J. S. p. 12)

These abnormal rates were in effect under the temporary order for fourteen months and the abnormal reductions in the intermediates (reductions in rail rate revenue made to avoid review of that unvacated order) can be expected to remain in effect only until the next general rail freight rate increase excepts barge-competitive rates, in the expectation of immediate fourth section relief. This continued effect on the barge-competitive rail rates in the future, is of exactly the same kind referred to by the court in *Southern Pacific Company v. Interstate Commerce Commission, supra*, when it held:

“ * * * and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy.” 219 U. S. at p. 452.

Compare, also, the successive separate taxes levied in *Papoliolios v. Dunning*, 175 F. 2d 73 (2d Cir., 1949).

III. APPELLEES' CITATIONS ARE NOT APPosite.

Appellees labor in vain to distinguish this Court's decision in the *Southern Pacific* cases (219 U. S. 453 and 219 U. S. 498)

Intervening appellees say that they were both rate cases (Motion p. 5). That is a mistake; one was a discrimination case. The court said:

“In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings.

But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." 219 U. S. at 515.

The court then quoted and relied on its decision in *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897) in which the lapsed *instance* of the challenged practice had no possible continuing effect.

The factors emphasized by this Court in both *Southern Pacific* cases as establishing the continuance of judicial power to dispose of the continuing controversy, are presented here.

1. The continuing nature of the question involved in a lapsed order of the Commission.¹
2. The short terms of the Commission orders determining such questions, when such questions may be involved in similar orders entered by the Commission in the future.²

(Here it is admitted on the pleadings that the entry of such orders is a continuing practice of the Commission.)

3. The public character of the question involved.³
4. The proper attachment originally of the reviewing court's jurisdiction.

Appellees do not urge that the jurisdiction of the court below did not properly attach originally. In both motions, however, appellees cite *Public Service Commission*

¹ 219 U.S. 515 and 452.

² 219 U.S. 515 and 452.

³ 219 U.S. 516.

v. *Wycoff*, 344 U. S. 237 (1952).⁴ That case held, however, that in electing to sue in a single-judge district court, rather than using the three-judge procedure provided in 28 U.S.C. Section 2284, plaintiff in that case had effectively barred himself from obtaining any review of the constitutional question he sought to present, or of any state action, and so could present to this Court only the abstract question of whether he was, or was not, engaged in interstate commerce. (344 U. S. 244) Obviously such a question was not a proper one originally for the single-judge court to which that plaintiff sought to submit it. That situation is entirely foreign to the one presented; the court below was a three-judge court. Other cases cited by intervening appellees also fail to meet this test of proper attachment of jurisdiction originally.⁵

5. The situation alleged to have made the case moot was created by voluntary action of the defendants, and defendants alone, without the plaintiff's consent or cooperation.⁶

⁴ Intervening appellees' Motion, page 4; Government's Motion, page 6.

⁵ *Electric Bond & Share v. Securities & Exchange Commission*, 303 U.S. 419 (1937); *International L. & W. Union v. Boyd*, 347 U.S. 222 (1953) both cited at page 4 of intervening appellees' motion.

⁶ "This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed." (219 U.S. at 514, emphasis ours)

"In *United States v. Trans-Missouri Freight Assn.*, *supra*, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case

In this respect the case is clearly distinguishable from certain cases cited by appellees, including all the labor cases relied on by them. In each of those cases parties asking the Court to retain jurisdiction had themselves negotiated and agreed to the settlement of the dispute or the workers had performed and plaintiff had accepted all the work and their mutual *de facto* settlement then became the basis of allegation of mootness.

Appellees' citations invariably lack one or more of the above enumerated factors.

• (Continued)

at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, * * *.' The case was therefore held not to be moot. Other situations were distinguished. "Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action." (219 U.S. at 515-516, emphasis ours)

CONCLUSION.

This proceeding presents a continuing justiciable controversy of great public significance. It is respectfully prayed that the motions to affirm be denied and this Court note its probable jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. [REDACTED] 41

A. L. MECHLING BARGE LINES, INC., a corporation,
MISSISSIPPI VALLEY BARGE LINE COMPANY, a
corporation, THE OHIO RIVER COMPANY, a corpora-
tion, and BLASKE, INC., a corporation,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS.

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Date Due: August 25, 1961

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1961.

No. 667

A. L. MECHLING BARGE LINES, INC., a corporation,
MISSISSIPPI VALLEY BARGE LINE COMPANY, a
corporation, THE OHIO RIVER COMPANY, a corpora-
tion, and BLASKE, INC., a corporation,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS.

This appeal is filed on behalf of A. L. Mechling Barge Lines Inc., Mississippi Valley Barge Line Company, The Ohio River Company and Blaske, Inc. These appellants will sometimes hereinafter be referred to as "Barge Lines." This Court by Order dated April 3, 1961, has postponed consideration of its jurisdiction to the hearing of the case on the merits.

OPINION BELOW.

The opinion below of the three-judge United States Dis-
trict Court for the Eastern District of Missouri, Eastern
Division, has not been reported, but appears at R. 61-65.

The orders of the Interstate Commerce Commission sometimes referred to herein as the "Commission," dated January 9, 1959, July 17, 1959, August 7, 1959, and September 10, 1959, were attached as Appendices to the complaint and appear at R. 14-19.

JURISDICTION.

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, and 5 U.S.C. §1009 to set aside and enjoin an order of the Interstate Commerce Commission and also under provisions of 28 U.S.C. §2201 and 5 U.S.C. §1009 for a declaratory judgment to settle important questions relating to the power of the Commission (over the written protests of competing regulated carriers) to enter orders relieving railroads from the long-and-short haul prohibition of Section 4 of the Interstate Commerce Act, 49 U.S.C. §4, without making the investigation which the statute requires and the Commission specifically finds necessary and without making any factual findings whatever that the statutory prerequisites for such relief exist. The decree of the District Court was entered on September 16, 1960. The Barge Lines filed their Notice of Appeal on October 21, 1960.

The jurisdiction of this Court on direct appeal from the order of the three-judge United States District Court is confirmed by 28 U.S.C. §1253, and the time for filing notice of appeal is fixed at sixty days by 28 U.S.C. §2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case:

Interstate Commerce Commission, 330 U.S. 567 (1947);

Dixie Carriers v. United States, 351 U.S. 56 (1956).

CONSTITUTION AND STATUTES INVOLVED.

The following constitutional provisions and statutes are involved:

United States Constitution, Amendment V;
United States Constitution, Article I, Section 1;
The National Transportation Policy, 49 U.S.C.,
note preceding Section 1;
Section 4, Interstate Commerce Act, 49 U.S.C. §4;
Section 8, Interstate Commerce Act, 49 U.S.C. §8;
Section 8 (b), Administrative Procedure Act, 5
U.S.C. §1007 (b);
Section 10, Administrative Procedure Act, 5 U.S.C.
§1009;
The Declaratory Judgment Act, 28 U.S.C. §§2201-
2202;
28 U.S.C. §§2321-2325.

These are set forth in the Appendix.

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

1. May the Commission over due and timely protests filed by these adversely affected Barge Lines, among others, lawfully authorize the rail carriers intervening herein forthwith to charge new rail rates, which do not comply with the long-and-short haul prohibition of Section 4 of the Interstate Commerce Act, by entering orders which

(a) make no findings of fact whatsoever disclosing the basis for such authorization or showing compliance by such Fourth Section "departure" rates with the standards, requirements, and conditions of Section 4 or any other sections or provisions of the Interstate Commerce Act;

(b) provide that at some unstated future date the Commission will conduct a hearing to determine whether such rates comply with the statutory standards, conditions, and requirements under which the Commission is empowered to authorize them; and

(c) expressly withhold the Commission's approval of such rates.

2. May the Commission over due and timely protests filed by these adversely affected Barge Lines, among others, lawfully enter such orders without an investigation that enables it presently to approve said departures from the long-and-short haul requirement of Section 4 of the Interstate Commerce Act as lawful under the conditions, standards, and requirements of that Act, especially Section 4 and the National Transportation Policy?

3. During the pendency of these Barge Lines' properly filed action to review by injunction and declaratory judgment such an order of the Commission, can the intervening railroads, by filing new rates to eliminate the subject fourth section departures and by withdrawal of their fourth section applications for the avowed purpose of avoiding such judicial review, remove such review from the judicial power of the United States when

(a) the Commission does not vacate the order;

(b) these Barge Lines have duly alleged that the Commission has repeatedly entered such orders to their injury; and

(c) neither the Commission nor the railroads deny the Commission's practice of entering such orders nor give any assurance or evidence that the Commission will not continue to enter such orders in the future?

4. Can these Barge Lines lawfully be deprived by said device of judicial review of the Commission's unvacated "temporary" order, leaving it to stand as a defense for the intervening railroads to any proceeding by these Barge Lines against the railroads for the unredressed injury caused by the railroads' said departure rates?

5. Has the United States consented to the use of a declaratory judgment in cases such as this one, and does 28 U.S.C. §2321 prohibit the use of a declaratory judgment in such circumstances?

STATEMENT OF THE CASE.

The proceeding below was brought before a statutory three-judge court to enjoin an order of the Interstate Commerce Commission as unlawful. It sought both an injunction and a declaratory judgment. It expressly challenged the continuing practice of the Commission to enter such orders, of which the order complained of is admittedly an instance, as unlawful and injurious to the appellants.

On or about December 4, 1958, certain railroads filed with the Interstate Commerce Commission an application asking the Commission's authority to depart from the prohibition of the Interstate Commerce Act against lower rates for larger hauls. It was docketed by the Commission as Fourth Section Application 35140. (R. 4-5)

These were railroads serving the northern Illinois grain producing area, and railroads operating east from Chicago. They are hereafter collectively referred to as the Railroads.

The rates for which the Railroads' application sought the Commission's authorization were rates on grains from northern Illinois to the east via Chicago. They were lower than the then current rates for shorter rail hauls from inter-

mediate rail origin points east of Chicago to the same eastern destinations on the same rail lines and routes.

The occasion for the Railroads' application for the Commission's authority was that such lower rates for larger hauls are prohibited by Section Four of the Interstate Commerce Act subject to the provision that the Commission upon application, "after" investigation and in "special cases," may authorize carriers to charge such rates, and prescribe the effect to which they may be relieved from the prohibition against them made by that Section, "but in exercising the authority conferred upon it in this provision, the Commission shall not permit the establishment of any charge from or to a more distant point that is not reasonably compensatory for the service performed." Section Four was by the Transportation Act of 1940 (amending the Interstate Commerce Act and, for the first time, bringing water carriers within the Commission's jurisdiction) subjected to the National Transportation Policy (54 Stat. 899, 49 U.S.C. note preceding Sec. 1) by the provision that: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Appellant Barge Lines are water carriers, authorized under the Transportation Act of 1940, who compete with the Railroads for the Chicago leg of the grain traffic to the east from these northern Illinois origins (but not from the intermediate origins east of Chicago from which higher rail rates obtained than those proposed for the longer haul from northern Illinois).¹ (R. 3)

¹ This is the same grain traffic involved in *Interstate Commerce Commission v. Mechling*, 330 U.S. 567 (1947). In that case the Railroads proposed to reduce the rate differential between barge-rail and all-rail transportation to the east

Waterways Freight Bureau representing the appellant barge lines, appellant A. L. Mechling Barge Lines Inc., individually, and numerous shippers protested to the Commission against grant of the authority to depart from the Fourth Section for which the Railroads had thus applied. These protests made factual allegations showing that statutory conditions did not exist for granting the authority for which the Railroads applied. (R. 5-6)

On January 9, 1959 the Commission entered an order for an investigation of "all matters and issues with respect to the lawfulness of said rates * * *" and the matter was thereby "assigned for hearing at a time and place to be hereafter fixed." (R. 6, 7)

On the same day, January 9, 1959, the Commission entered as "Fourth Section Order 19059" a further order (set forth at R. 14, 15) stating that, effective the following day, January 10, 1959, the Railroads were thereby authorized to "establish and maintain" the said rates, (according to their application, to maintain the same "without observing the long-and-short-haul provision of Section 4 of the Interstate Commerce Act," etc.) until the further order of the Commission "to be entered after hearing in said fourth-section application No. 35140."

This order contained *no finding of fact whatever*. By like supplemental orders entered on similar Railroad applications, the origin territory covered by those Fourth

¹ (Continued)

from northern Illinois, by higher rates to the east on grain that had reached Chicago by barge. Here, they proposed to reduce the differential between barge-rail and all-rail transportation from northern Illinois to the east by lower through rates on the long haul from northern Illinois than on their shorter hauls on local rates from all-rail origins east of Chicago. Cf. *Interstate Commerce Commission v. Mechling*, *supra*, 330 U.S. 567 at 574, 577, 579-580.

Section departure rates was slightly extended (R. 15-16). (The original order together with the supplements shall hereafter be referred to collectively as F.S.O. 19059).

It has become the practice of the Commission to enter such orders authorizing rail carriers (over the protests and to the injury of these competing water carriers) to establish rates that depart from the long-haul-short-haul requirement of the Fourth Section of the Interstate Commerce Act at the same time that it orders an investigation and without making any findings of fact, to be effective until such time as the Commission may enter a further order. (R. 11, Par. 19)

The effect of these rail rates which the Commission thus authorized without any finding established and maintained without regard to the long-haul-short-haul provision of the Fourth Section of the Interstate Commerce Act, was forthwith to divert from appellant barge lines to the Railroads, business to Chicago which, but for said rates, the barge lines would have handled (R. 10, Par. 17; and see R. 59-60).

After these rates had been in effect for about six months the Commission finally held hearings, and the record was closed in mid-July, 1959. The Commission still made no finding that the record made at the hearings enabled it to approve these rates under the standards of the Interstate Commerce Act that govern the Commission's exercise of its authority to authorize departures from the long-haul-short-haul prohibition of the Fourth Section. (The order "authorizing" them had expressly disclaimed "approving" them.) The rates, and their injury to appellants, continued for yet another three months, and more. Meanwhile the Railroads asked the Commission

to reopen the record that had been closed the previous July, and on October 28, 1959, the Commission reopened the record over the appellants' objection.² (Rec. 7-8)

These barge line appellants and Cargill, Inc., thus, on November 16, 1959 instituted this proceeding before the statutory three-judge court below.³ Their complaint set forth the above facts (R. 1-10) and the continuing practice of the Commission to enter such orders, as here, without any findings of fact, to the repeated injury of appellants (R. 11). It prayed an adjudication that F.S.O. 19059 is unlawful, void, beyond the power of the Commission, arbitrary, unsupported by essential findings, and asked for an injunction annulling and enjoining the operation of said order, for a declaratory judgment against the practice of the Commission to enter such orders without any findings of fact, and for general relief (R. 12-13).

The United States and the Commission filed an answer. The Railroads, as intervenors, also filed an answer. These answers insisted on the lawfulness of the Commission's said procedures. None of the defendants or intervenors was able to deny any of the factual allegations of the complaint, except that the Railroads (not the Commission and the United States) denied the substantial injury alleged in paragraph 17 of the complaint (R. 28-32, 35-40). The extremely severe injury to appellant A. L.

² The answer of the United States and the Commission states that the matter was set for further hearing on February 1, 1960 (R. 31). The answer of the intervening Railroads discloses that such further hearing had been postponed without day (R. 38).

³ The court was convened pursuant to 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive (R. 12).

Mechling Barge Lines Inc. was stated in an affidavit of its executive vice-president, F. A. Mechling, in support of Appellants' Motion for Summary Judgment in the court below (R. 59-60). (There was no contrary showing.) Neither answer denied that "the Commission, as here, still follows the practice of entering such orders without supporting finding", as alleged in paragraph 19 of the complaint (R. 11, 31, 39). Recent instances of the practice injuring appellants are set forth in the affidavit of Wesley A. Rogers in support of Appellants' Motion for Summary Judgment in the court below (R. 54). (There was no contrary showing.)

After this proceeding had been pending in the court below for over four months and before evidence was taken, on March 28, 1960, the Railroads notified the Commission that, effective March 10, 1960, they had now reduced the intermediate rates so that these intermediate rates did not exceed the rates from the more distant points and that they withdrew their Fourth Section Application (R. 45-48). On March 31, 1960, the Commission permitted the withdrawal of the application, *but did not vacate F.S.O. 19059 (R. 48) under the "authority" of which the Railroads had maintained the rates departing from the long-haul-short-haul requirement of Section Four to the injury of appellants for fourteen months, from January 10, 1959 to March 10, 1960, without any findings of fact by the Commission showing that its authorization of said rates was in accordance with the standards and requirements of the Interstate Commerce Act for such authorization.*

The Commission and the Railroads then moved the court below to dismiss the case as one presenting no controversy (R. 40-49).¹ Appellants moved for a summary judgment, filing supporting affidavits (R. 50-60).

The lower court dismissed the case as one that presented no controversy, and that was, therefore, beyond the power of the federal courts (R. 64, 65).

¹ Court reports show that this has become one of the standard maneuvers of the Railroads and the Commission, when challenge of "temporary" orders, authorizing departure from the Fourth Section without making any findings of fact, seems about to encounter judicial determination. The instant case is the first in which the injured water carriers have resisted it on the ground, now apparent (and here admitted) that the entry of such orders, as here, has become a continuing practice of the Commission. Cf. Jurisdictional Statement, pages 10, 11, and Reply to Motions to Affirm, pages 4, 5.

ARGUMENT.

Introduction

Reference to rate orders of the type here complained of as "temporary" is part of what has been called the jargon of transportation, but it should not obscure the reality that every rate order is subject to the further orders of the Commission, and that every order authorizing a rate is final for the period of its duration. The orders in question are frequently in effect four to five months before the Commission even holds any hearings on them. A "temporary" rate order of shorter duration was held to be final and reviewable in *Prendergast v. New York Telephone Company*, 262 U.S. 43 (1933) because the temporary rates "were final legislative acts as to the period during which they should remain in effect pending the final determination." (Id., 262 U.S. at p. 49.)

These orders are the diametrical opposite of the "temporary" relief traditionally granted by courts of chancery to *maintain* the *status quo* pending hearing. These orders authorize the establishment of new rates; they change the *status quo* — before hearing.

To say that they authorize the establishment and maintenance of rates, is to say what they expressly say themselves (R. 14, 16, 17, 19). Under the terms of Section Four, it is only with the authorization of the Commission (authorization which such orders purport to give) that rates departing from the long-haul-short-haul provision of the Fourth Section can be charged at all by the Railroads. (*Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914); *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 566 (1919)). If Congress constitutionally could lodge in any public agency an arbitrary power to per-

form the legislative act of authorizing rates without regard to standards prescribed by Congress itself (and surely it could not, *Panama Refining Company v. Ryan*, 293 U.S. 388, 433 (1935)), it is plain that Congress has not undertaken to invest the Commission with power to authorize rates that disregard its otherwise universal prohibition of rates departing from the Act's long-haul-short-haul provision *without regard to the standards* prescribed by the Interstate Commerce Act to govern such action. Section Four itself (49 U.S.C. § 4(1)) prescribes that "in exercising the authority conferred upon it in this proviso" (namely the authority to authorize Fourth Section departure rates) the Commission "shall not" permit the establishment of a rate that is not reasonably compensatory; and the opening phrases of the proviso in their context mean that a "special case" must be established as the required basis for the exercise of such power. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919). Since the enactment of the Transportation Act of 1940, the Commission may exercise this power only subject to and in accordance with the National Transportation Policy, which requires that it shall authorize only rates that are not destructively competitive, and that preserve the inherent advantages of competing forms of transportation. National Transportation Policy, 54 Stat. 899, 49 U.S.C., note preceding Section 1; *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, 574, 577, 579-580 (1947); *Dixie Carriers v. United States*, 351 U. S. 56, 59; (1956).

It is well settled that no order of the Commission affirmatively authorizing rates under statutory standards is a lawful order unless it contains findings of fact which enable a reviewing court to perceive that the Commission did (or did not) relate its action in the particular circumstances of

the very case to the prescribed statutory standards governing its actions (*Florida v. United States*, 282 U.S. 194, 212, 215 (1931); *United States v. Chicago, Milwaukee & St. Paul R. Co.*, 294 U.S. 499, 504-505 (1935); see *Alabama Great Southern Ry. v. United States*, 340 U.S. 216, 228 (1950)). It is the will of Congress that the acts of administration shall be subject to judicial review to determine whether they are, or are not, within the boundaries of the legal standards that Congress has prescribed, 28 U.S.C. §§2231-2235, 2284; Administrative Procedure Act, 5 U.S.C. §1009; §1007(b)). That will cannot be carried out, unless the administrator, by findings of fact, discloses how it has—or has not—related its action to those standards in the very case. Therefore findings of fact are essential to the lawfulness of an order authorizing rates under statutory standards. *Florida v. United States, supra*; *United States v. Chicago, Milwaukee & St. Paul R. Co., supra*.

This is plainly necessary if the standards Congress has prescribed to govern administrative action (which standards alone prevent its delegation of power to administrators from being a void delegation of legislative power) are to be effective controls over administrative action. This Court has rested the requirement that administrators shall make such essential findings of fact, not only on the legislative will that there shall be effective judicial review of administrative action, but also on fundamental principles of constitutional government. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935). In this case the administrators authorized a rate without making any findings at all (and it admittedly follows the practice of doing so).

Over and above the foregoing, it appears by the record in this extraordinary case that the Commission authorized

this rate before it was able to reach its own conclusion as to whether the circumstances warranted such action under standards of the law as it, itself, understands those standards. Section Four forbids it to authorize lower rates for longer hauls if such rates are not "*reasonably compensatory*." That is a statutory standard for its action that it understands as follows:

"In the light of these and similar considerations, we are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing compensation; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the Act."

Transcontinental Cases of 1922, 74 I.C.C. 48, 71 (1922)

The Commission not only made no findings under that, or any other, standard of the Act *on the same day* that it authorized these Fourth Section departure rates, but it found that, on consideration of the protests against them, an investigation was necessary, and assigned the matter for hearings *to be held later*. It authorized the rates *before* the investigation that it found was necessary (and, which it never concluded).

We submit that the Commission was right in finding that an investigation was necessary and that the necessary investigation was by hearing. When protests are filed against the authorization of Fourth Section departure rates (rates

that can do damage such as that described at Record 59-60) even due process requires a hearing. Water carriers are at least entitled to a hearing before they are subjected to ruinously destructive competitive rates. It was precisely by lower rail rates for longer rail hauls that the Railroads ruined the water carriers once before, and this was "one of the main factors" which precipitated the creation of the Interstate Commerce Commission in 1887. (*Petroleum Products from New Orleans, La. Group*, 194 I.C.C. 31 (1933) at 44-45, per Eastman, Commissioner.) These rates were authorized to be established and maintained before any hearings, before even a time for hearing had been set.

The Commission and the Railroads have hitherto been able to evade final adjudication as to the legality of this practice. Between them they can always end the term of the order wherever judicial determination appears imminent—the Commission by entering an order with findings often denying further Fourth Section relief, or the Railroads, by changing the rates so as to eliminate the Fourth Section departure. But that does not redress the damage suffered from the rates in the meantime, nor does it leave any possibility of recovering total damage, for the order that authorizes the rates is not vacated and it cannot be collaterally attacked. Nor does it leave the injured water carriers with any prospect for the future except the certainty that the continuing injurious practice (on whose legality the Commission and the Railroads flatly insist) will be repeated to their continuing injury.

The Commission and the Railroads again insist that by changing their rates and withdrawing their Fourth Section Application (without, however, vacating the Fourth Section order), they have ended the controversy and again kept the practice beyond the reach of the judicial power of the United States—have rendered the case "moot."

This case (unlike others) squarely alleges (R. 11) that *** the Commission still follows the practice of entering such orders without supporting findings" and challenges the practice as well as the order which is an instance of it.⁸

I.

THE COURTS RETAIN JURISDICTION OF THIS PROCEEDING TO REVIEW THE UNVACATED F.S.O. 19059 DESPITE THE ATTEMPT OF APPELLEES TO AVOID JUDICIAL REVIEW OF A RECURRENT AND CONTINUING COMMISSION PRACTICE.

A. Even If Appellants Had No Further Interest In F.S.O. 19059, The Controversy Would Still Be Justiciable And The Court Would Retain Jurisdiction.

It is apparent that the controversy between appellants and appellees over the continuing practice of the Commission in granting "temporary" authority for Fourth Section departures to the Railroads over the protests of the appellants and without any hearing or findings in the order granting such authority continues and will continue so long as the Railroads continue to use this device to divert substantial amounts of traffic from the appellants. This controversy over a continuing practice is justiciable. *Carpenters' Union v. National Labor Relations Board*, 341 U.S. 707, 715 (1951); *Cf. Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958), rehearing denied, 356 U.S. 925.

When the Railroads reduced their intermediate rates and withdrew their Fourth Section application after F.S.O. 19059 had been in effect for fourteen months, they did so

⁸ The answers do not deny the averment (R. 11, 31, 39) that the Commission still follows this practice. The failure to deny the averment admits it. Fed. R. Civ. P. 8(d).

with the intention of ousting the courts of jurisdiction to review the order. In the past, as here, defendants have sought to oust a court's jurisdiction properly obtained and prevent judicial review of their repeated action by putting an end to the action and its effects for the time being without giving any promise or indication, even circumstantially, that the action would not be repeated in the future. When the plaintiffs complaining of the action have not agreed to, or connived at, such cessation of the disputed action, this Court has uniformly refused to yield its jurisdiction in such circumstances. When, as here, the action involved is one by a regulatory agency of great importance to the transportation industry and to the public generally, this Court has regarded the public importance of the action as additional reason for retaining jurisdiction and rendering a definitive decision on the propriety of the action.

The Commission itself was the defendant in two of the first of these cases. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911) and in *Southern Pacific Company v. Interstate Commerce Commission*, 219 U.S. 433 (1911) questions were raised regarding orders entered by the Commission for a period of two years only and before judicial review of these orders could reach this Court, the two year period of the orders had expired. In each case the Commission sought to have this Court dismiss the proceedings as being moot. In each case this Court refused, succinctly stating in the first-cited case its disapproval of any idea that there could be a no-man's-land of "temporary" or short term orders as to which ultimate judicial decision on review could be evaded at will by the Commission:

“The *questions* involved in the orders of the Interstate Commerce Commission are usually continuing (as

are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." (Emphasis added)

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911).

The principle that judicial review of unlawful administrative or official action properly invoked must not be barred by the short term nature and lapse of a specific instance of such action when it can be repeated in the future to the injury of those seeking review, has been invoked repeatedly by this Court and the lower federal courts. *Walling v. Helmerich & Payne*, 323 U.S. 37, 43 (1944); *McGrain v. Daugherty*, 273 U.S. 135, 180-182 (1927); *Gay Union Corporation v. Wallace*, 112 F.2d 192 (D.C. Cir., 1940), cert. den., 310 U.S. 647; *Dyer v. Securities & Exchange Commission*, 266 F.2d 33, 46-47 (8th Cir., 1959) cert. den., 361 U.S. 835 and 911; *Papoliolios v. Durning*, 175 F.2d 73 (2d Cir., 1949); *Boise City Irrigation & Land Co. v. Clark*, 131 Fed. 415 (9th Cir., 1904); and see cases cited in *Diamond, Federal Jurisdiction To Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 136 (1946). This same principle has been followed with respect to unlawful actions by individuals who have ceased the unlawful action only after the scrutiny of the court was invoked, but have neither circumstantially nor by direct promise shown that the action was unlikely to recur in the future. *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Carpenters Union v. National Labor Relations Board*, 341 U.S. 707, 715 (1951); *United States v. Aluminum Co. of America*, 148 F.2d 416, 447-448 (2d Cir., sitting as a

court of last resort, 1945); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 308 (1897).

The circumstances which this court emphasized in its decision in the *Southern Pacific* cases as requiring retention of its jurisdiction, and which have been adverted to in various of the later decisions on this point are all present in the case now before the Court.

1. The question involved is one of a continuing nature since the appellees have each admitted by their answers to Paragraph 19 of the Complaint that the Commission's practice of entering such orders continues, and their efforts to prevent judicial review of F.S.O. 19059 while insisting on its entire legality, indicate their purpose to continue the practice in the future.*

2. The orders continue in effect for terms too short under normal circumstances to allow sufficient time to complete judicial review, the periods being very similar to the

* In many of the cases involving cessation of illegal activity by defendants who were not governmental agencies, the determination of the likelihood that the action in question would be resumed in the future has been the point receiving the most attention from the court. See e.g., *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 635 (1953); *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *United States v. Aluminum Company of America*, 148 F.2d 416, 447-448 (2d Cir. sitting as a court of last resort, 1945); *Diamond, Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L.Rev. 125, 146 (1946). Apparently this emphasis arises in cases that meet the other requirements enumerated except for the public importance of the question involved. In any event, there is here not the slightest suggestion by the Commission that this practice has ended. Quite the contrary, the Commission admits on the pleadings that it continues to follow the practice, and insists by its answer on the legality of that practice as it is illustrated by the instance thereof described in the complaint. (R. 31, Pars. XII and XIII).

two year orders involved in the *Southern Pacific* cases,⁷ which continue to be entered by the Commission.

3. The public character of the question involved is apparent since the orders of the type involved are having, and are designed to have, marked effect on the distribution of traffic among various modes of regulated public transportation.

4. The reviewing court's jurisdiction properly attached originally, since appellees have not contended that the complaint was not properly filed in the court below.⁸

5. The situation alleged by appellees to have made the case moot was created by voluntary action of the appellees themselves without any consent or cooperation from, or fault of, the appellants.⁹

⁷ F.S.O. 19059 in the present case was in effect for fourteen months without further order of the Commission. The order under review in *Dixie Carriers v. United States*, 143 F.Supp. 844 (1956) was not superseded by further order of the Commission until two years after its entry, although it was annulled by the three-judge court during that time. The "temporary" order mentioned in *Corn & Corn Products, Illinois to Official Territory*, 310 I.C.C. 437, 438 (1960) was in effect about three years before it was superseded by further order of the Commission. Other "temporary" orders entered over protest and without findings or hearing described in the Affidavit of Wesley A. Rogers (R. 54) range in duration from seven to eighteen months for cases still waiting for first hearing or for superseding order of the Commission.

⁸ That this Court emphasized this circumstance is made plain at 219 U.S. 516.

⁹ The court discussed the fact that if a case is to become moot, it must be because of some occurrence without fault of the defendant at page 514, emphasizing this fact again and the lack of plaintiff's participation in bringing about the occurrence when it discussed the *Trans-Missouri Freight Association* case at 219 U.S. 515-516.

It has been particularly characteristic of previous attempts to obtain definitive judicial review of the Commission's "temporary" Fourth Section orders entered without hearing or finding over the protest of the injured plaintiffs, that the Railroad and the Commission alone have acted to prevent decision by this Court or by the lower court. Thus in *Coastwise Lines v. United States*, 157 F. Supp. 305, 306 (1957), *American Commercial Barge Line Company v. United States*, Civil No. 11772 (S.D. Tex., 1959) and in this case the Railroads have withdrawn their Fourth Section applications rather than submit the Commission's "temporary" order to judicial review of a three-judge court. In *Dixie Carriers v. United States*, 355 U.S. 179 (1957) the Commission obtained vacation of the adverse order of the three-judge court by entering a superseding order while the case was pending before this Court. It followed a similar practice in *United States v. Amarillo-Borger Express*, 352 U.S. 1028 (1957), although the "temporary" order in that case did not involve a Fourth Section application.

In none of these cases prior to the present case had the plaintiffs alleged in their complaints that the Commission's order was an example of a continuing practice by the Commission, and they therefore had no basis for invoking the doctrine of the *Southern Pacific* cases which maintains the jurisdiction of the courts. It was precisely because of this experience that the allegations of Paragraph 19 were included in the present complaint to avoid another failure to press to ultimate judicial decision the question of the propriety of such Commission orders.¹⁰

¹⁰ Such a decision by this Court appears to be necessary since, as alleged in Paragraph 19, the Commission has ignored the well-reasoned opinions by the three-judge courts in

B. Appellants Have A Continuing Interest In Having F.S.O. 19059 Vacated Since It would Be a Defense To Any Action By Appellants Against The Railroads For Damages Suffered From The Railroads' Fourth Section Departure Rates.

In *Southern Pacific Terminal Company*, Justice McKenna recognized that the unvacated order of the Commission might possibly have some future effect but based the court's continuing jurisdiction to review the order on the broader considerations discussed above.¹¹ In *Southern Pacific Company*, after stating that *Southern Pacific Terminal Company* controlled on the question of mootness, Chief Justice White added as an additional reason for retaining jurisdiction the effect of the Commission's order on suits for reparations against the Railroads and "the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the rail-

¹⁰ (Continued)

Dixie Carriers v. United States, 143 F. Supp. 844 (S.D.Tex., 1956), remanded as moot on appeal, 355 U.S. 179, and in **Seatrail Lines v. United States**, 168 F. Supp. 819 (S.D.N.Y., 1958), which held that these "temporary" orders without findings are improper. In two other unreported cases the courts have divided, one court temporarily restraining such an order until the Fourth Section applications before the Commission were withdrawn (**American Commercial Barge Line Company v. United States**, S.D.Tex., Civil No. 11772) and the other granting a motion to dismiss the action on the ground that the order was not reviewable (**A. L. Meckling Barge Lines Inc. v. United States**, N.D. Ill., Civil No. 57 C 1450). The latter case did not hold that the order was proper, but only that it was not reviewable, and there thus appears to be no way to get review of such orders in the Seventh Circuit, leaving parties resident in this circuit entirely without relief from the provisions of such orders.

¹¹ 219 U.S. 514-515.

roads of their authority to fix just and reasonable rates in the future.¹¹

In this case a similar situation exists in that the Commission has not vacated F.S.O. 19059 and it now stands as the sole authorization for rates which without such authorization are illegal. *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914); *United States v. Louisville & Nashville Railroad Co.*, 235 U.S. 314, 322-323 (1914); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 566 (1919); *Patterson v. Louisville & Nashville Railroad Co.*, 269 U.S. 1, 11 (1925). Until the order is vacated, no attack can be made upon the Railroads for charging such rates, since such an attack would be an attack on the order itself. *Lambert Run Coal Company v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 390, 382 (1922); *Venner v. Michigan Central Railroad Co.*, 271 U.S. 127, 130 (1926). Such collateral attack on Commission orders is not permitted, actions to review Commission orders being required to be brought directly in the manner provided by federal statutes. *Venner v. Michigan Central Railroad Co.*, *supra*; *Callanan Road Company v. United States*, 345 U.S. 507, 512-513 (1953); *Simpson v. Southwestern Railroad Company*, 231 F.2d 59, 62 (5th Cir., 1956), cert. den., 352 U.S. 828.

Thus until it is reviewed and vacated, F.S.O. 19059 stands as a bar to any action by these appellees for damages caused by unlawful action of the Railroads as provided in Section 8 of the Interstate Commerce Act (49 U.S.C. §8). As indicated by Justice McKenna in *Southern Pacific Terminal Co.*, the extent of appellants' right to such dam-

¹¹ 219 U.S. 452.

ages need not be defined,¹³ and, indeed, is a collateral issue which cannot properly be made a subject of this proceeding. The point is that appellants should be able in appropriate proceeding under Section 8 to have their right to such damages determined, and they cannot do so as long as F.S.O. 19059 remains unvacated.

C. Relief By Way of Declaratory Judgment Is Available Under Section 10(b) Of The Administrative Procedure Act As A Supplement To Injunctive Relief.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, provides that, except in two circumstances not applicable here, *any* person adversely affected or aggrieved by *any* agency action within the meaning of any relevant statute shall be entitled to judicial review of such action. In the absence or inadequacy of any relevant special statutory review proceeding, any applicable form of legal action, specifically including actions for declaratory judgments among others, shall be available as a form of proceeding.¹⁴

¹³ "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings." *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515.

¹⁴ Pertinent portions of Section 10 are as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion:

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * * (5 U.S.C. § 10009)

The Urgent Deficiencies Act, 28 U.S.C. §§2321-2325 and 2284, provide an injunctive form of judicial review in an action against the United States before a three-judge district court for orders of the Commission.¹³ Appellants have, of course, invoked this form of judicial review, and as seen from the foregoing, continue to press to have F.S.O. 19059 set aside. Fearing, however, that the injunctive relief might be inadequate,¹⁴ the plaintiffs below included in Paragraph 19 a plea for a declaratory judgment on various questions involved in testing the propriety of F.S.O. 19059. Such questions are not only pertinent to the decision with respect to F.S.O. 19059, but to future conduct of the Commission in implementing its intention to continue issuing "temporary" Fourth Section orders like F.S.O. 19059. Such declaratory relief would be precisely that useful supplement to the remedy provided by the Urgent Deficiencies Act which Section 10(b) of the Administrative Procedure Act was designed to afford. Its use here will most effectively ensure the compliance of the Commission and avoid the necessity for invoking the harsh injunction proceeding to review further orders of the Commission that are requested

¹³ From the direction in 28 U.S.C. §2322 that suits to review Commission be brought against the United States and the permission in Section 10(b) of the Administrative Procedure Act to supplement the statutory form of proceeding with pleas for declaratory relief when the statutory proceeding is inadequate, it may be seen that the United States has consented to suits of this kind against itself.

¹⁴ If a complaint states facts which will support two different legal bases for relief, either one may ultimately be made the theory of the plaintiffs' case. *Park & Tilford v. Schulte*, 163 F.2d 984 (2d Cir., 1947), cert. den. 332 U.S. 761; *Reconstruction Finance Corporation v. Goldberg*, 143 F.2d 752 (7th Cir., 1944), cert. den. 323 U.S. 770; *Keiser v. Walsh*, 118 F.2d 13 (D.C. Cir., 1941); *Pennsylvania R. Co. v. Mummert-Phillips, Inc.*, 42 F. Supp. 340 (N.D. Calif., 1941); *Gay v. E. H. Moore, Inc.*, 26 F. Supp. 749 (ED.Okla., 1939).

by the Railroads under the circumstances specified in the Complaint's prayer for declaratory judgment, and will serve as a guide to both the Commission and an important national industry on the legal requirements in proceedings of this kind. The declaratory judgment is available as an additional form of review when the right to review already exists. *Brownell v. Tum We Shung*, 352 U.S. 180 (1956); *Raydist Navigation Corp. v. United States*, 144 F. Supp. 503, 505 (E.D. Va., 1956). If no other form of proceeding can afford quite the form of relief needed, that is no bar to, but rather a reason for granting declaratory relief. *Order of Railway Conductors v. Swan*, 329 U.S. 520 (1947).

Thus there is good reason for granting the declaratory relief prayed in the complaint in order to settle a controversy which has vexed Commission, Railroads and Barge Lines for over five years and gives certain promise of continuing to be vexatious if this Court does not settle the important questions presented.

II.

F.S.O. 19059 IS VOID BECAUSE, DESPITE APPELLANTS' PROTESTS, IT CONTAINS NONE OF THE FINDINGS REQUIRED BY LAW TO SHOW ANY FACTUAL OR LEGAL BASIS FOR CONCLUDING THAT THE RATES AUTHORIZED COMPLY WITH THE REQUIREMENTS OF SECTION 4 OF THE INTERSTATE COMMERCE ACT OR OF THE NATIONAL TRANSPORTATION POLICY.

F.S.O. 19059 contains no findings of fact or conclusions of law. The order, other than the ordering paragraphs, consists of a ten-line dependent clause which is pertinent to this point only in that it refers to the Railroads' Fourth Section application as amended and purports to make it a

part of the order. The order contains no findings as to which, if any, of the matter's stated in the application are true, ignores completely the fact that protests had been filed as well as the facts alleged in the various protests filed, and contains no conclusions of law nor any other indication that the Commission is even aware of the statutory prerequisites to the grant of Fourth Section relief. The Commission expressly states that it does not approve the rates and makes them subject to correction if in conflict with any provision of the Interstate Commerce Act. Nevertheless it authorizes the rates, and the injury they are designed to do to the Appellants.

The mere reference to the application made in the order cannot supply the lack of findings. This Court quoted with approval the following pertinent language in *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935), at p. 433:

"It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this."

The omissions of findings are in direct violation of long standing requirements for the validity of administrative action. Principles of constitutional government require an administrative delegate of Congress to make findings showing how it related its action to the standards under which Congress authorized it to act. Without such findings the order is void.

"We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional govern-

ment.' " *Panama Refining Company v. Ryan*, 293 U.S. at p. 433, quoting with approval *Mahler v. Eby*, 264 U.S. 32, 44 (1924).

Since the requirement is constitutional, neither the language of any statute nor consideration of administrative convenience can abrogate it. In *Alabama Great Southern Railway Co. v. United States*, 340 U.S. 216, 228 (1950), this Court held that Section 14(1) of the Interstate Commerce Act, which requires the Commission to state its findings in cases involving an award of damages and its conclusions after all investigations, does not relieve the Commission of the duty in a case not involving an award of damages to make these basic "findings essential to an order."

The statutory standards here must be met for unless the Commission authorizes the rates as provided by law, the Railroads cannot lawfully charge them. *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 566 (1919). These standards are that (1) a "special case" must exist, (2) the lower rate for the longer haul must be "compensatory" (Section 4(1), Interstate Commerce Act, 49 U.S.C. §4(1)), and the lower rate must not be destructively competitive and must preserve the "inherent low-cost advantage" of the competing water transportation (National Transportation Policy, 49 U.S.C., Note Preceding §1; *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, 574, 577, 579, 580 (1947)). Yet the order in question has no finding, conclusion, or any statement of the Commission's basis for action with respect to any of these prerequisites.

Such absence of findings has been held to make the orders unlawful both before and after the enactment of

Section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b))." A partial list of cases so holding includes *Florida v. United States*, 282 U.S. 194 (1931); *United States v. Baltimore & Ohio Railroad Co.*, 293 U.S. 454 (1935); *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 499, 504-505 (1935); *North Carolina v. United States*, 325 U.S. 507 (1945); *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Illinois*, 355 U.S. 300 (1958); and see the legislative history of Section 8(b) in *Amarillo-Borger Express v. United States*, (N.D. Tex., 1956) 138 F. Supp. 411, Note 13 at pp. 418-419. There, of course, can be no doubt that the Administrative Procedure Act applies to the Commission. *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173, 192 (1959).

F.S.O. 19059, containing no findings of fact whatsoever despite the protests of appellants and others, does not comply with the constitutional and statutory requirement that it reveal its factual and legal basis in such manner as to enable a court to review intelligently whether it complies with the statutory prerequisites to the issuance of Fourth Section orders.

"Section 8(b) provides as follows in pertinent part as follows:

"* * * All decisions (including initial, recommended or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented upon the record * * *."

III.

F.S.O. 19059 IS VOID BECAUSE, CONCURRENTLY WITH INSTITUTING AN INVESTIGATION INTO THE LAWFULNESS OF THE RATES WHICH IS REQUIRED BY SECTION FOUR OF THE INTERSTATE COMMERCE ACT BEFORE THE RATES MAY BE AUTHORIZED, THE COMMISSION ISSUED F.S.O. 19059 AUTHORIZING THE RATES.

On the same day that the Commission entered its original order in this proceeding authorizing these rates to be established forthwith, it entered an order instituting an investigation "into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in" the rate schedules in connection with which the Railroads had filed their Fourth Section application (R. 21). Similar investigations were ordered concurrently each time orders supplementing F.S.O. 19059 were issued (R. 22-27). At the same time the Commission made F.S.O. 19059 effective "until the effective date of the further order to be entered after hearing in fourth-section application No. 35140," and similarly the supplements to F.S.O. 19059 were made so effective.

As is the Commission's usual practice, hearings in the fourth section proceeding and the investigation were subsequently held by the same Examiner simultaneously, making a single record for both proceedings. Thus it is apparent that at the time F.S.O. 19059 was entered the Commission had not completed an investigation which it considered necessary to determine the lawfulness of the rates, and that its actual investigation into that question was started *after* F.S.O. 19059 was entered and never completed (without resulting in any further order).

This practice clearly does not comply with Section Four's requirement that orders authorizing Fourth Sec-

tion departure rates be entered only upon application by the carrier and *after* investigation has shown that a special case exists." It is not enough just for the carrier to make application, as the Commission's orders show was done here.

When, as here, the carriers' application discloses that the purpose of the rates is to divert traffic from other common carriers regulated by the Commission, and those carriers (as well as many affected shippers) protest against grant of the requested authority, the Commission's investigation must be in the form of a hearing in order to give the protesting carriers opportunity to confront and cross-examine those witnesses whose testimony is to be used as a basis for depriving the protestants of their revenues. In such cases "the requirement of Section 4 that authorization shall be made, if at all, 'after investigation' clearly implies that the question shall be determined upon testimony and after a hearing." *Louisville & Nashville Railroad Co. v. United States*, 225 Fed. 571, 580 (W.D. Ky., 1915), *aff'd*, 245 U.S. 463 (1918). The positive findings of fact necessary to determine that a special case existed justifying Commission approval of the Fourth Section departures can properly be made in such cases only after evidence has been adduced at a hearing. *Cf. Dixie Carriers v. United States*, 143 F. Supp. 844, 854 (S.D. Tex., 1956); remanded as moot, 355 U.S. 176.

The Fifth Amendment itself requires such hearing, for there can be no doubt that this practice of authoriz-

¹¹ The pertinent language of Section 4 is as follows:

"Provided, that upon application to the Commission such common carrier may in special cases, *after investigation*, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of persons or property; * * *." (Emphasis added)

ing Fourth Section departures specifically aimed at diverting the traffic of the water carriers to the Railroads can erode away the traffic of the water carriers by successive "temporary" orders until the water carriers can no longer exist. The ability of the Railroads to use their enormously greater financial resources and reservoir of noncompetitive business not available under any circumstances to the water carriers to finance depressed-rate competition with the water carriers under Fourth Section authorizations from the Commission and the inevitable result of such competition, were prophetically noted by Commissioner Eastman in his concurring opinion in the Fourth Section proceeding reported as *Petroleum Products from New Orleans, La. Group*, 194 I.C.C. 31 (1933) at pages 44-45:

"This promises to be the beginning of a return to a policy of railroad rate making which existed for many years and reached its fullest development in the southeastern portion of the country. That section forms a peninsula surrounded by the navigable waters of the Atlantic Ocean, the Gulf of Mexico, the Mississippi River, and the Ohio River and penetrated by many other navigable streams. The railroads in their early years encountered stiff competition from many steamboat lines plying upon these waters, and they proceeded to meet this competition ruthlessly. Eventually they swept the waters clean of the competing craft, except on the ocean and the Gulf, and even there the competition was greatly weakened.

"This was done by cutting rates where the competition existed, to whatever extent was necessary to paralyze it, at the same time maintaining rates at a very high level elsewhere. The steamboats did not have this reservoir of noncompetitive traffic to help them out, and hence perished in the unequal struggle.

Some large interior cities which did not have water competition were able to utilize the competition of the railroads with each other to break down their rates in somewhat the same manner, but interior points which had little or no competition of any character were out of luck. Their rates were on what the railroads called a 'normal level', which was preposterously high. All this made, of course, for a very uneven development of the country, and it was one of the main factors which precipitated the creation of this Commission in 1887.

"The theory on which the railroads drove out water competition by these low rates was a simple but, as I see it, dangerous theory. They argued that their trains would run anyway, that the added expense of taking on more traffic would be comparatively little, and that if they could get water-competitive traffic at some margin over this 'added' or 'out-of-pocket' expense, it would help them just that much. The danger in this theory is twofold. In the first place, the railroads have always had very imperfect knowledge of this 'added' expense, and in the old days it was more of a theory than anything else. They went out frankly to cut the throats of their water competitors and made the rates whatever was necessary for this purpose. In the second place, the theory places the chief burden of sustaining the profits and credit of the railroads upon the noncompetitive traffic, and this burden is likely to increase progressively. Commerce and industry tend to center at the favored competitive points, and their traffic tends to increase while that at the 'normal rate' points tends to decrease. Gradually the traffic moving on the low rates ceases to be mere 'added' traffic and the 'out-of-pocket' expense swells in volume. So does the burden upon the noncompetitive traffic.

"The danger of following this theory under present conditions is obviously much greater than it was

in the old days, for the trucks, pipe lines, and electric transmission lines have greatly curtailed the amount of strictly noncompetitive traffic.

"After the railroads swept the inland waterways practically clean of competing traffic, two influences set in. One was a public demand upon Congress for appropriations for the improvement of the waterways, so that they could handle traffic more cheaply and efficiently. The other was a gradual revision of the railroad rate structure to a so-called 'dry land' basis, owing to the absence of water competition which could be used to justify fourth-section relief. These two influences have brought a return of the water competition which had disappeared, and it is progressively increasing."

Section 4 is designed to curb such cutthroat competition, and contains provisions disclosing the intent of Congress to protect the competing water carriers.¹⁰ The practice of the Commission in authorizing without any hearing departures for periods of two or three years, even when the departures are avowedly aimed at diverting water-borne traffic and the water carriers protest, has the effect of depriving the water carriers of their traffic without any hearing or opportunity to demonstrate that the injurious rates do not comply with the statutory standards. Such practice thus gives them no effective means for protecting themselves for these periods of time against the loss of traffic effected by the rates. To authorize such injury without affording any opportunity for

¹⁰ Section 4(1) requires that the applicants' departure rates be at least compensatory to the applicants in order to prevent unrestrained cutthroat competition, and further provides that no departures shall be authorized on account of potential water competition. Section 4(2) provides that the depressed departure rates cannot be increased solely because the water competition has been eliminated.

hearing on issues that the barge carriers raise by their protests and on which they ask to be heard is a deprivation of property without due process of law in violation of the Fifth Amendment. *Clarksburg-Columbus Short Route Bridge Co. v. Woodring*, 89 F. 2d 788, 790 (D.C. Cir., 1937); remanded as moot, 302 U.S. 658. Although the hearing need not be held at any particular time, it must precede making effective the rate action against which protest is made. *Jordan v. American Eagle Fire Insurance Company*, 169 F. 2d 281 (D.C. Cir., 1948).

Thus it may be seen that the Commission obviously had not made, and now never will complete, the investigation which Section 4 requires prior to entry of an order authorizing Fourth Section departures. Furthermore, when the matter involves rates so injurious to water carriers who have protested against authorizing such rates and for whom protection against unrestrained injury is supposed to be provided by the National Transportation Policy and by the conditions in Section 4 itself, the investigation required must afford an opportunity to the water carriers to be heard and to confront and cross-examine the witnesses, if any, in support of the application. The present practice of the Commission results in the loss of business by the barge lines with no effective way to test the compliance of the Railroads' rates with statutory standards, nor even any indication that the Commission has attempted to make the test the statute requires. The Fifth Amendment requires more than this, and so does Section 4.

CONCLUSION.

This case is an attempt to obtain, after some years and many previous abortive, effective judicial review of a Commission practice which has already resulted in great injury to appellants and will, if unchecked, result in even greater injury in the future. The recurring nature of the practice, as alleged in the complaint and admitted by the appellees, together with the refusal of the Commission to vacate F.S.O. 19059 (and its insistence on the lawfulness of the action challenged as unlawful) are more than enough to make the controversy a continuing and justiciable one over which this Court retains jurisdiction.

The utter lack of the required findings in F.S.O. 19059 makes it apparent that the order cannot be sustained and that the Commission's practice of entering such orders over protest is unlawful. Furthermore when, as here, the Commission shows that it authorized the rate before it made the investigation, such an order cannot be sustained. Finally when, as here, the rates are avowedly designed to divert traffic from other carriers and those carriers protest against grant of the authorization, the carriers to be injured are entitled, before the rates are permitted to become effective, to a hearing in which they can present their evidence showing that the rates do not comply with the statutory standard and to test opposing evidence offered by the applicants.

Respectfully submitted,

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APPENDIX.

Article I, Section 1, Constitution of the United States:

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Amendment V, Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The National Transportation Policy, 54 Stat. 899, note preceding the Interstate Commerce Act, 49 U.S.C.:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.”

Section 4 of the Interstate Commerce Act, 49 U.S.C. §4:

(1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred

upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive Points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Section 8 of the Interstate Commerce Act, 49 U.S.C. §8:

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or

shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

*Section 8(b) of the Administrative Procedure Act, 5
U.S.C. §1007:*

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions; and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

*Section 10 of the Administrative Procedure Act, 5
U.S.C. §1009:*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Interstate Commerce Commission Orders, Enforcement and Review Act, 28 U.S.C. §§2321-2325:

§2321. The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

§2322. All actions specified in section 2321 of this title shall be brought by or against the United States.

§2323. The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objec-

tion of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

§2324. The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§2325. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202:

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS
v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION*

BRIEF FOR THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 61-65) has not yet been reported.

JURISDICTION

The order of the district court dismissing the complaint was entered on September 16, 1960 (R. 60-61), and the notice of appeal was filed on October 21, 1960 (R. 65-66). On April 3, 1961, this Court postponed the question of jurisdiction to the hearing on the merits (R. 68). The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

Section 4 of the Interstate Commerce Act authorizes the Interstate Commerce Commission, after investigation and "in special cases" and under specified conditions, to relieve rail carriers from the prohibitions in that section against charging less for transportation for a longer distance than for a shorter distance. The following questions are presented:

1. Whether a judicial proceeding for review of a Commission order authorizing lower rates for a long haul than for a short haul is rendered moot when the railroads reduce the rates on the short haul to eliminate the differentials prohibited by Section 4.
2. Whether the Commission, after an informal investigation but without a hearing, may grant temporary authority to charge less for a long haul than for a short haul, pending final disposition of an application for permanent authority.

STATUTE INVOLVED

Section 4 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 4, provides in pertinent part:

- (1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the

intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the

provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a complaint to set aside an order of the Interstate Commerce Commission. The Commission order, entered under Section 4 of the Interstate Commerce Act, authorized the appellee railroads temporarily to charge lower rates for long hauls than for short hauls, pending the determination of their application for permanent authority to do so. The district court dismissed the complaint on the ground that the case was moot.

A. THE COMMISSION'S PRACTICE UNDER SECTION 4

Section 4 of the Interstate Commerce Act (*supra*, p. 2) makes it unlawful for any common carrier by rail or water to charge more for transportation for a shorter distance than for a longer distance

over the same line or route in the same direction. It empowers the Commission, however, after investigation and "in special cases," to authorize a carrier to charge less for a long haul than for a short haul, provided that the rate for the long haul is reasonably compensatory, and provided further that there must be some reason for the authorization other than merely potential water competition. Exemption from the statutory long-and-short haul prohibition is commonly known as fourth section relief.

Under the Commission's Rules and Regulations, carriers seeking fourth section relief are required to file a detailed application setting forth the facts and circumstances warranting such authority. See 49 C.F.R. 143.75-143.85. When such an application is filed, the Commission refers it to a staff group of three rate specialists known as the Fourth Section Board, which operates informally. See 49 C.F.R. 1.200. Notice of the application is given in the Federal Register, and protests must be filed within 15 days. Either the applicant or a protestant may request a hearing. The Commission's practice is to order a hearing whenever requested by an interested party. It may also—and sometimes does—order a hearing even though no one has requested it, and even though no protests have been filed.

If, at the end of the 15-day period, no protest has been filed, the Fourth Section Board may either refer the case to the Commission with its recommendation, or decide the case itself. In the latter

event, its ruling is subject to reconsideration by the Commission.

In cases where no hearing is ordered, the Commission (or the Fourth Section Board), on the basis of its study of the application, either grants appropriate relief or denies the application. Although the Commission ordinarily does not make any findings in such cases, it does not grant temporary or permanent authority¹ unless it is satisfied that the statutory criteria therefor are met, namely, (1) that there is a "special case" based on circumstances other than potential water competition and (2) that the long haul rates are "reasonably compensatory." In cases where there is neither protest nor hearing—and these constitute the bulk of the Section 4 proceedings—the Commission ordinarily takes final action on the application within 30 days after filing.

Where the matter is set for hearing, however, the Commission frequently grants temporary authorization pending the hearing and determination of the application for permanent authority. The Commission makes its decision whether to grant temporary relief on the basis of the application, the protest, and any comments by interested parties. Until recently, the Commission generally has not made any findings when granting temporary authority. See *infra*, pp. 33-34.

If the Commission orders a hearing, it may also institute a general investigation of the lawfulness in other respects of the rates affected by the applica-

¹ The Commission uses the term "continuing relief" to describe such permanent authorization.

tion. The two proceedings are usually consolidated for hearing (as was done in this case, see *infra*, p. 8-9.)

The Commission has issued literally many thousands of fourth section permanent authorizations, and several thousand temporary ones. During the period covering the five fiscal years 1956 through 1960, for example, it granted a total of 4911 permanent authorizations; the annual number ranged from 703 in 1959 to 1446 in 1957. During the same period, a total of 285 temporary authorizations were issued; their annual number ranged from 50 in 1960 to 66 in 1959. **70th Annual Report of the Interstate Commerce Commission**, p. 59; **71st Ann. Rep.**, p. 36; **72d Ann. Rep.**, p. 36; **73d Ann. Rep.**, pp. 37-38; **74th Ann. Rep.**, pp. 40-41. The practice of granting temporary fourth section relief has existed for 74 years, ever since the Commission was established in 1887. See **1st Annual Report of the Interstate Commerce Commission**, pp. 19-20; **4 Sharfman, The Interstate Commerce Commission** (1937), pp. 244-246; **Monograph of the Attorney General's Committee on Administrative Procedure**, S. Doc. No. 10, Part 11, 77th Cong., 1st Sess., pp. 46-47.

B. THE COMMISSION PROCEEDINGS IN THE INSTANT CASE

This case involves rates for the carriage of grain from the Middle West to the East. Appellants are common carriers by water (R. 2-3, 29, 65), who compete with certain of the appellee railroads in the movement of such traffic (R. 3). The grain moves by barge, rail, or truck from producing areas in Northern Illinois to Chicago, and then by rail to the East (R. 3). Prior to January 10, 1959 the railroads

operating between the grain areas and Chicago "had in effect certain reduced rates * * * which rates were allegedly published to meet truck and barge competition on such traffic" (R. 3). The railroads operating out of Chicago to the East had proportional rates on the grain which, in conjunction with the rates from Northern Illinois to Chicago, provided combination rates from Northern Illinois to points in the East (R. 3). "In order to avoid violations of the long-and-short haul provision of section 4 of the Act, the formation of such through combination rates was subject, among other restrictions, to the restriction that the through combination could not be lower than the local rate from Chicago to the involved destination" (R. 3-4).

In December, 1958, the railroads filed with the Commission tariffs for lower rates on this traffic which, among other things, eliminated the requirement that the through combination rates could not be lower than the local rates from Chicago (R. 4, 30). This would "permit the application of combination rates from origin to final destination which were lower than the local or flat rates from Chicago to the same destination" (R. 4). "Since such rates would be in violation of the long-and-short haul provision of section 4 of the Act," the railroads also filed applications for relief from such provisions (R. 4-5, 30). Protests against the proposed tariffs and petitions for suspension thereof were filed by appellant A. L. Mechling Barge Lines and others, and the railroads filed a reply (R. 5-6, 30).

On January 9, 1959, the Commission (Division 2) instituted an investigation into the lawfulness of the rates proposed by the railroads, and set the matter for hearing (R. 20-21). It also issued an order (R. 14-15)—which is the subject of this litigation—that authorized the railroads to maintain the lower long haul rates “and to maintain higher rates from and to intermediate points.” The order was to be effective “until the effective date of the further order to be entered after hearing” in the proceeding for permanent fourth section relief. The order further stated that “The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act” (R. 15).² The Commission made no formal findings in issuing the order.

Hearings were held before an examiner in July, 1959 (R. 10, 58). The railroads subsequently filed applications for further fourth section relief covering additional points in Illinois and Wisconsin (R. 15-27). On October 28, 1959, the Commission consolidated those applications with the original application, and reopened the proceedings for further hearings (R. 10, 27-28, 59).

C. THE PROCEEDINGS IN THE DISTRICT COURT

On November 16, 1959, appellants filed a complaint in the district court to set aside and enjoin the enforce-

² Such a clause is customarily included in fourth section orders, to indicate that the rates proposed may be challenged in an appropriate proceeding before the Commission as to their effect upon particular persons.

ment of the order of January 9, 1959 granting temporary fourth section relief (R. 1-14). The complaint also sought a declaratory judgment that the Commission is without power to grant such temporary relief in contested cases, at least unless, after hearing, it makes the same findings it makes when granting permanent relief (R. 13).

Prior to the hearing in the district court, the railroads published, effective March 10, 1960, reduced rates from the intermediate points which left the short-haul rates no higher than the long-haul rates (R. 46-48). On March 28, 1960, the railroads then withdrew their pending applications for permanent exemption from the requirements of Section 4 (R. 46), and on March 31, 1960 the Commission advised them that such applications "will be considered as withdrawn" (R. 48). Shortly thereafter, the government and the railroads moved to dismiss the complaint, on the ground that the new tariffs filed by the railroads, and the withdrawal of their application for permanent fourth section relief, had rendered the case moot (R. 40-43, 49).¹

The district court held that the case was moot, granted the motions to dismiss, and entered a judgment of dismissal (R. 61). In a *per curiam* opinion (R. 61-65), the court stated that it was its "duty * * * to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot

¹They also urged (R. 40, 43-44, 49) that the plaintiffs were not entitled to a declaratory judgment. The district court did not reach the question. See *infra*, p. 27, n. 10.

affect the matter in issue in the case before it'" (R. 64). It ruled (R. 65):

There is nothing pending in the case before us. The cause of any controversy that existed has been terminated by dismissal [of the application before the Commission]. To lay down rules of practice for future guidance of the Commission would be nothing more than the substitution of judicial for executive administration.

SUMMARY OF ARGUMENT

I

Section 4 of the Interstate Commerce Act prohibits a carrier from charging lower rates for a longer distance than for a shorter distance over the same route in the same direction, unless authorized by the Interstate Commerce Commission. In the present case, the Commission granted appellee railroads temporary relief from this prohibition, pending a hearing on their application for permanent relief. After appellants had filed their complaint in the district court challenging the order granting temporary relief, the railroads lowered their short-haul rates to the level to which they previously had reduced their long-haul rates, and thus eliminated the differential prohibited by Section 4. They also withdrew their application for permanent fourth section relief.

In these circumstances, the district court correctly dismissed the case as moot. The elimination of the differentials in favor of long-haul shipments rendered academic the only issue properly before the district court—the validity of the Commission's order tem-

porarily authorizing such differentials. That order affected only those rates with respect to which the application for relief was filed, and when the differentials were terminated, the order ceased to have operative force.

Appellants are actually seeking an advisory opinion as to the validity of the procedures followed by the Commission in granting temporary fourth section relief—not because there is any outstanding order which injures them, but because of the possibility that future orders may injure them. But the duty of the federal courts "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653. This Court has frequently rejected the contention that a controversy, otherwise moot, continues to exist merely because of the alleged need for an adjudication of the validity of the general practice involved.

Nor does the case cease to be moot because of appellants' claim that a judicial adjudication of the validity of the order granting temporary relief is necessary to enable them to maintain an action for damages against the railroads. The Commission concedes that this particular order is invalid for lack of findings (see Point II, *infra*), and the effect of such an order upon appellants' right to recover damages can be fully determined in any suit they may bring. Furthermore, there is serious question whether an action for damages may be maintained against a carrier for acts done in reliance upon a

Commission order that is subsequently invalidated for lack of adequate findings or failure to hold a hearing. Indeed, we know of no instance in which a competing carrier has maintained an action for damages against another carrier based on the latter's alleged violation of Section 4.

II

If the Court should conclude that the case is not moot, we acknowledge that this particular order cannot stand. We recognize that, at least in contested cases, the Commission, in order to grant such relief, must make findings showing that, to the degree necessary to justify temporary relief, the statutory criteria have been satisfied. The findings must show that this is a "special case" (*i.e.*, one in which the reduction in the long-haul rates was made to meet competition); that the lower long-haul rate is reasonably compensatory; and that such rate has not been reduced to meet "merely potential" water competition.

There is no merit, however, to the two other grounds upon which appellants challenge the order—namely, that it was entered without a hearing and that the requisite statutory investigation was not made.

A. In contrast to many other provisions of the Interstate Commerce Act, Section 4(1) does not require the Commission to hold a "hearing" before it grants fourth section relief, but only to conduct an "investigation." The distinction is not inadvertent. The very next paragraph of the statute, Section 4(2), provides that once long-haul rates have been reduced

under Section 4(1), they may not be raised unless, "after hearing," the Commission finds that such proposed increase rests upon changed conditions other than the elimination of water competition.

The distinction between "hearing" and "investigation," moreover, is one which Congress has repeatedly considered in its study of Section 4. The history of this consideration shows that Congress was repeatedly advised of the Commission's practice of granting temporary fourth section relief without hearing, and that it rejected proposals to amend the Act to require a hearing. In these circumstances, Congress must be deemed to have acquiesced in the Commission's settled view that the "investigation" required by Section 4 does not include an evidentiary hearing.

B. The Act authorizes the Commission to grant fourth section relief only "after investigation." Appellants argue (Br. 31-32, 36) that the Commission's initiation of a formal investigation of the application for permanent relief at the same time that it granted temporary relief, shows that the Commission had not made the requisite statutory "investigation" when it granted temporary relief. This argument overlooks a basic distinction between the two types of investigation, and fails to recognize the well-established authority of administrative agencies to take action that, although itself meeting the statutory standards, may be subject to reconsideration after further examination and study.

The Commission's determination whether to grant temporary fourth section relief pending a hearing on the application for permanent relief, is made on the basis of a careful study of the application, the

protest, and any comments by interested parties. The application for fourth section relief is a lengthy document containing detailed information on all significant aspects of the proposal, which is sufficient to enable the Commission to make an informed judgment whether temporary relief would be consistent with the standards of Section 4. The formal investigation and hearing of the application for permanent relief is designed to permit a fuller exploration of the issues than was possible in the Commission's consideration of the need for temporary relief. But the initiation of such formal investigation, even though done simultaneously with the granting of temporary relief, provides no basis for implying that the earlier informal investigation was in any sense inadequate or failed to meet the statutory requirement of "investigation." It merely indicates that the Commission will reexamine the original grant of relief, on the basis of the record made in the subsequent hearing, to decide whether the relief should be made permanent. This Court's decision in the *New England Divisions Case*, 261 U.S. 184, supports the validity of the Commission's practice of granting temporary relief upon a thorough informal investigation of the proposal, subject to further consideration upon completion of the formal investigation.

ARGUMENT

The substantive issues in this case relate to the authority of the Interstate Commerce Commission to grant temporary relief from the long-and-short haul prohibitions in Section 4 of the Interstate Commerce Act, pending Commission determination of an applica-

tion for permanent relief therefrom. Appellants here challenge, as they did in the district court, both the Commission's authority to grant any temporary relief, and the validity of the order granting such relief in this case. The latter is attacked because it was entered without findings and without a hearing. The district court found it unnecessary to decide any of these questions, since it held that the case was moot.

In Point I, we shall argue that the district court correctly dismissed the case as moot, and that this Court should therefore affirm the judgment of the district court. If this Court, however, should hold that the case is not moot, the normal practice would be to reverse the judgment of the district court, and to remand to that court to consider the other issues, both substantive and procedural, which it did not decide. Cf. *Federal Trade Commission v. Anheuser-Busch*, 363 U.S. 536, 542. In this case, however, the substantive questions are purely legal; there are no factual issues in the resolution of which an analysis of the record by the lower court would be of assistance; the record is slim; the issues have been fully canvassed and briefed before this Court; and they are of general importance and warrant decision by this Court. In these circumstances, we believe that it would be appropriate for this Court, if it reaches the merits, to decide them itself rather than to remand to the district court to decide them in the first instance. Cf. *O'Leary v. Brown-Pacific Mazon*, 340 U.S. 504, 508.

In Point II, we shall accordingly discuss the merits. We shall there argue that the Commission may

grant temporary fourth section relief without a hearing, and that such grant may be made even though the agency simultaneously orders an investigation and hearing into the application for permanent authority. We concede that, at least in contested cases, the Commission must make explicit findings with respect to the statutory criteria for granting such relief. Since the Commission, in granting temporary fourth section relief in this case, made no such findings, we recognize that its order cannot stand.

Since the Court has postponed the question of jurisdiction to the hearing on the merits, Rule 16(4) of the Revised Rules requires us to discuss the jurisdictional issue at the outset. We think it clear that the Court has jurisdiction of this appeal. Section 1253 of Title 28 provides that any party may appeal to this Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an act of Congress to be heard and determined by a district court of three judges." Proceedings to review orders of the Interstate Commerce Commission are required to be heard by a three-judge court, and the customary form of such proceeding is an action to enjoin, suspend and set aside the Commission order. See 28 U.S.C. 1336, 2321-2325.

The complaint in this case sought to "enjoin" the Commission's order granting temporary fourth section relief (R. 1, 12). The order of the district court, from which this appeal is taken, dismissed

the complaint and "denied" "the relief therein prayed for" (R. 61). That order plainly was one "denying * * * [a] permanent injunction in [a] civil action, suit or proceeding" within the meaning of 28 U.S.C. 1253, and it was also a final judgment. See 28 U.S.C. 2101(b).

The fact that the district court dismissed the complaint and denied injunctive relief upon the ground that the case was moot, does not affect the jurisdiction of the Court to hear the appeal. Where a case becomes moot while on appeal, the proper disposition by the appellate court "is to reverse or vacate the judgment below and remand with a direction to dismiss. * * * That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." (*United States v. Munsingwear*, 340 U.S. 36, 39-40). Where, however, as here, the case became moot while it was still pending in the lower court and the latter then dismissed for that reason, the proper disposition by the appellate court, if it agrees that the case was moot, is to affirm the judgment of dismissal. For the issue on appeal is whether the case was correctly dismissed as moot; that presents a real controversy between the parties; and an affirmance on that ground does not bar future relitigation of the substantive issues between the parties. The government contends that the district court correctly dismissed the action as moot; if the Court

agrees, the proper form for implementing that decision is to affirm the judgment of dismissal.⁴

I

THE DISTRICT COURT CORRECTLY HELD THAT THE CASE IS MOOT

1. The complaint in the district court attacked, and sought to enjoin, the Commission's order granting the appellee railroads temporary authority to charge lower rates on grain moving from Northern Illinois through Chicago to the East than on grain moving from Chicago (and other intermediate origins) to the same eastern destinations. Unless authorized by the Commission, such rate differentials are prohibited by Section 4 of the Interstate Commerce Act. While the case was pending in the district court, however, the railroads eliminated the differentials by reducing their rates on the short haul to the level of those on the long haul, and withdrew their application for permanent authority to maintain the previous differentials.

The result of these changes in rates was to render moot the only issue properly before the district court—the validity of the temporary authorization of lower long-haul rates (see *infra*, pp. 22-27, 31, n. 11). The

⁴ Section 2105 of Title 28 does not dictate a contrary result. It provides: "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." The holding below that the case was moot, however, does involve jurisdiction, since if that ruling is correct, there was no case or controversy before the district court. Cf. *Snyder v. Buck*, 340 U.S. 15, 21-22.

Commission's fourth section order operated only prospectively, and it ceased to have any operative effect as soon as the rate differentials which it authorized were eliminated. In these circumstances, the district court properly dismissed the case as moot.

The duty of the federal courts "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653; see *Local No. 8-6, Oil Workers Union v. Missouri*, 361 U.S. 363; *Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 416.

Indeed, this Court has already recognized, in circumstances strikingly similar to those in the present case, that the termination or cancellation of lower long-haul rates, challenged as illegal under Section 4, renders moot any controversy as to the validity of a fourth section order temporarily authorizing such rates. *Atchison, T. & S.F. R. Co. v. Dixie Carriers, Inc.*, 355 U.S. 179. In that case the railroads had filed tariffs with lower rates for longer distances than for shorter distances, and an application for fourth section relief. The Commission initially had suspended the rates; it subsequently vacated the suspension order, and granted temporary fourth section relief pending further order after hearing. The competing water carriers then filed a complaint in the district court challenging both the order vacating the suspension, and that granting the temporary fourth

section relief. The district court held both orders invalid, and set them aside. *Dixie Carriers, Inc. v. United States*, 143 F. Supp. 844 (S.D. Tex.). The government and the rail carriers appealed, challenging the rulings on both orders, and this Court noted probable jurisdiction. 353 U.S. 906.

Thereafter all parties filed a joint memorandum suggesting mootness. They stated (Memorandum Suggesting that the Cause is Moot, Nos. 60, 61, 62, O.T., 1957, p. 3) that, subsequent to the noting of probable jurisdiction, the Commission had completed its investigation of the rate schedules involved, had concluded that certain of the rates had not been shown to be just and reasonable, and had ordered their cancellation and denied the application for fourth section relief. They concluded (*ibid.*) that since the Commission's final order required cancellation "of the rate schedules involved in the orders enjoined by the District Court * * * the propriety of the Commission's earlier actions vacating its suspension order and granting temporary Fourth Section relief is now only of academic interest." The parties therefor requested that the judgment of the district court be vacated and the case remanded with directions to dismiss the complaint (*ibid.*) This Court, "[u]pon the suggestion of mootness," entered such an order. 355 U.S. 179. Cf. *Arkansas & Louisiana Missouri Ry. Co. v. Amarillo-Borger Express, Inc.*, 352 U.S. 1028, involving a similar situation relating to the mootness, pending appeal, of a Commission order vacating an order suspending rates (no order under Section 4 was

involved). See, also, *Sprunt & Sons, Inc. v. United States*, 281 U.S. 249, and *United States v. Anchor Coal Co.*, 279 U.S. 812, where changes in the rates under judicial review were held to have rendered moot the controversy over their validity.

2. Although there is thus no present controversy between the parties over any existing rate schedule,³ appellants nevertheless contend (Br. 17) that the case is not moot because there is a controversy "over the continuing practice of the Commission in granting 'temporary' authority for Fourth Section departures to the Railroads over the protests of the appellants and without any hearing or findings in the order granting such authority * * *." In other words, appellants are seeking an advisory opinion, wholly unrelated to any particular threatened injury to them, as to the general validity of the Commission's practice and procedure in granting temporary fourth section relief.

Appellants are not entitled to such an adjudication. "The pronouncements, policies and program" of the Commission "did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract ques-

³ The reduced rates on both the long-haul and the short-haul traffic are still in effect. Appellants may at any time challenge their reasonableness by filing a complaint with the Commission under Section 13(1) (49 U.S.C. 13(1)) of the Act. See *United States v. Merchants & Manufacturers Traffic Association*, 242 U.S. 178, 188.

tions. * * * Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324-325.

Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498, upon which appellants principally rely (Br. 18-21), does not support their claim for a judicial determination of the validity of the Commission's general practice in issuing temporary fourth section orders. In the *Southern Pacific Terminal* case, the Commission ordered the terminal company to cease and desist for a two-year period (the maximum permitted by law),⁶ from giving undue preference and advantages to a particular shipper. The district court upheld the order and, while the case was pending before this Court, the order by its terms expired. The Commission contended that "the case is [therefore] now moot" and that the appeal should be dismissed. 219 U.S. at 510. This Court held that the case was not moot. It stated (p. 515):

* * * The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review * * *.

- * This statement, however, must be read in the light of the case before the Court. Since the Commission

⁶The Hepburn Act of 1906 limited the duration of all Commission orders (other than for the payment of money) to two years. 34 Stat. 589. This limitation was repealed by the Transportation Act of 1920. 41 Stat. 484.

had held that the particular advantages given by the terminal company to the shipper were illegal, an order prohibiting them for only two years was "capable of repetition" in the sense that, if the company resumed the same illegal practice after the order expired, an identical order (except for the new expiration date) presumably would be issued after further proceedings. In such circumstances, the controversy between the parties as to the legality of the underlying practice continued, even though the particular short-term order prohibiting it was no longer in effect.

In the present case, however, the particular fourth section order involved (that is, one covering the same points and the same rates) is not, in any realistic sense, "capable of repetition" (*Southern Pacific Terminal, supra*). The railroads have reduced their short-haul rates to the level of the long-haul rates, and any establishment of new differentials between such rate-levels would have to be evaluated by the Commission in the light of the different factual situation then existing. Indeed, the ground upon which appellants seek relief is not that this order is likely to be repeated, but that the Commission may enter similar orders in other cases involving different rates, and that an adjudication of the Commission's general "practice" of entering such orders should therefore be made (Br. 17, 20).

This Court, however, has consistently rejected the argument that a controversy, otherwise moot, continues to exist because of the alleged need for an adjudication of the validity of the general practice involved.

This view was recently reiterated in *Local No. 8-6, Oil Workers Union v. Missouri*, 361 U.S. 363; *Harris v. Battle*, 348 U.S. 803. Both cases involved the validity of state laws authorizing the governor to seize public utility companies whose employees are on strike; in both, the strike was settled and the seizure terminated during the pendency of the litigation challenging the constitutionality of the seizure. In *Oil Workers*, this Court pointed out (p. 368) that in *Harris* the state court proceeded to decide the merits and held the seizure constitutional, even though the seizure had terminated. It stated (pp. 368-369, footnotes omitted):

* * * In this Court it was urged [in *Harris*] that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 514-516. In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U.S. 803. Upon the authority of that decision the same contentions must be rejected in the present case.

Appellants contend (Br. 20-21), however, that unless they secure a judicial determination of the validity of the Commission's general practice, they cannot obtain review of an individual temporary fourth sec-

tion order, since “[t]he orders continue in effect for terms too short under normal circumstances to allow sufficient time to complete judicial review * * *.” Appellants themselves, however, did not seek judicial review of the Commission’s order for more than ten months after its issuance,¹ and they cannot now properly complain because, after they filed their complaint, the railroads reduced the short-haul rates to eliminate the differential prohibited by Section 4. In so doing, the railroads acted fully within their authority. Section 4 did not deprive them of “the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them” (*Skinner & Eddy Corporation v. United States*, 249 U.S. 557, 564). Indeed, the railroads still have “the option, if relief from the operation of the fourth section is denied, to keep in effect the low rate to the more distant point by lowering the rates to intermediate points” (*id.*, pp. 566-567). *A fortiori*, they may do so after they have been granted temporary relief, while the application for permanent relief is still pending.

It is true, as appellants point out (Br. 22), that there have been three other cases (in addition to the present one) in which pending judicial proceedings to review temporary fourth section orders have been rendered moot either by subsequent Commission decision in the permanent application² or by the action

¹ The order was issued on January 9, 1959 (R. 14-15), and the complaint was not filed until November 16, 1959 (R. 1).

² The *Dixie Carriers* case, *supra*, pp. 20-21. In that case the Commission denied the application for permanent fourth section relief.

of the railroads in revising their tariffs to eliminate the challenged rates.' But these isolated examples do not support the broad claim that judicial review of particular fourth section orders cannot be obtained.

Nor can appellants draw any comfort from the Declaratory Judgment Act, which they invoked in the district court (R. 1, 13) and upon which they rely here (Br. 25-27). For the Act only applies to "case[s] of actual controversy" (28 U.S.C. 2201), "a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts" (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325). If, as we believe, this case became moot when it was before the district court, there was no case or controversy before that court, and that court had no jurisdiction to render a declaratory or any other kind of judgment.¹⁰

¹⁰ In *American Commercial Barge Line Company v. United States*, Civil No. 11772 (S.D. Tex.), the railroads revised their tariffs approximately a year after the case had been argued and submitted to the district court. In *Coastwise Line v. United States*, 157 F. Supp 305 (N.D. Calif.), the revisions were made before the case came on for hearing in the district court. The court had previously granted temporary restraining orders against the lower long-haul rates.

Since the district court held that the case was moot, it did not reach the contention of the government (R. 40, 43-44) and the appellee railroads (R. 49) that review of orders of the Interstate Commerce Commission may be had only under the Urgent Deficiencies Act, and not under the Declaratory Judgment Act. The latter Act cannot "be used as a substitute for statutory methods of review" (*Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 246). The sole method that Congress has provided for review of orders of the Interstate Commerce Commission is the Urgent Deficiencies Act (28 U.S.C.

3. Appellants further contend (Br. 23-25) that the case is not moot because the Commission has not vacated its order granting temporary fourth section relief; and that such order, unless vacated, bars any action by them against the railroads for damages based on the latter's possible violation of Section 4. They suggest that such an action for damages would be authorized by Section 8 of the Act (49 U.S.C. 8), which makes any common carrier which violates the Act liable in damages to "the person or persons injured thereby."

Although the order is invalid for lack of findings (see *infra*, pp. 32-33), there is no need for its formal rescission or vacation. For under the Commission's settled practice the order ceased to have any effect when the railroads withdrew their application for fourth section relief and published new rates that complied with Section 4. *Vicksburg, S. & P. Railway v. Anderson-Tully Co.*, 256 U.S. 408, 416; *L. P. Maggioni & Co. v. Atlantic Coast Line R. Co.*, 272 I.C.C. 127, 131; *Watters-Tonge Lumber Co. v. Southern Ry. Co.*, 186 I.C.C. 342. What appellants apparently are seeking, therefore, is not merely a vacation of the order, but a judicial adjudication of its invalidity, for use in a possible damage action. In the circumstances of this case, however, the alleged need for such an ad-

1336, 2321-2325). Suits under that Act must be brought against the United States (28 U.S.C. 2322). While Congress has consented to such suits, it has not waived sovereign immunity to authorize proceedings against the United States which seek review of Commission orders under the Declaratory Judgment Act. See *Isoner v. Interstate Commerce Commission*, 90 F. Supp. 361, 365-366 (E.D. Mich.); *Noeding Trucking Co. v. United States*, 29 F. Supp. 537, 554 (D.N.J.).

judication is not sufficient to create a justiciable controversy.

In the first place, there is serious question whether an action for damages may be maintained against a carrier for acts done in reliance upon a Commission order that is subsequently invalidated for lack of adequate findings or failure to hold a hearing. Cf. *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301; *Arizona Grocery Co. v. Atchison, T. & S.F. R. Co.*, 284 U.S. 370. Secondly, and more important, the validity of the temporary fourth section order, and its effect on appellants' right to recover damages, can be fully determined in any damage suit they may bring. Appellants themselves concede (Br. 24-25) that their "right to such damages * * * is a collateral issue which cannot properly be made a subject of this proceeding." They are not entitled to an adjudication of the invalidity of the Commission's order solely because such a ruling might aid them in a possible action for damages—a type of action which, as far as we know, has never before been instituted. We are aware of no case in which a competing carrier (as distinguished from a shipper) has maintained an action for damages against another carrier based upon the latter's establishment of lower rates alleged to be in violation of Section 4(1), or, indeed, for violation of any other provision of the Act.

There is language in *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433, which indicates that the possible impact of a Commission order in a future damage suit may prevent a case challenging the order from being moot, even though

the order itself is no longer operative. In that case (which was decided the same day as the *Southern Pacific Terminal* case, *supra*), the Commission had ordered the railroads to reduce certain rates which it found were unreasonable, and the district court had upheld the order. The order by its terms expired in two years. This Court rejected the argument that, since the order had expired, the case before it was moot, since it deemed the issue "disposed of" by the *Southern Pacific Terminal* case. 219 U.S. at 452. The Court further stated (*ibid.*), however, that "[i]n addition to the considerations expressed in that case it is to be observed that clearly the suggestion [of mootness] is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future."

This statement, however, is inapplicable to the present case for two reasons. (1) The rate structure established by the Commission's order in the *Southern Pacific* case was still in effect and had a continuing impact upon future rate developments. In the present case, however, the differentials between the long and the short haul rates authorized by the temporary fourth section order are no longer in effect. (2) As long as the *Southern Pacific* order declaring the old rates unreasonable was unreversed, the railroads remained subject to possible liability to shippers for reparations, based on the collection of rates that

had been held to be unreasonable. In the present case, however, the invalidity of the temporary fourth section order is not disputed; and the only issue in the damage suit with respect to that order would not be its validity, but the validity of rates collected while it was in effect. The latter issue, as we have indicated, is one that can be fully litigated in the damage suit. There is accordingly no need for a judicial adjudication of what the Commission has already conceded, namely, that the temporary fourth section order is invalid.

II

THE COMMISSION MAY, WITHOUT A HEARING, GRANT TEMPORARY RELIEF FROM THE LONG-AND-SHORT HAUL PROHIBITIONS IN SECTION 4 AFTER INFORMAL INVESTIGATION AND UPON APPROPRIATE FINDINGS, EVEN THOUGH IT SIMULTANEOUSLY INSTITUTES A FORMAL INVESTIGATION OF THE APPLICATION FOR PERMANENT RELIEF

Appellants challenge the Commission's order granting temporary fourth section relief on three grounds: (1) the order was entered without a hearing; (2) no formal findings accompanied it; and (3) since simultaneously with its issuance, the Commission directed a hearing on the application for permanent fourth section relief, the agency had not completed the investigation that the Act requires before any fourth section relief may be granted.¹¹

¹¹ In addition to directing a hearing upon the railroads' application for permanent fourth section relief (R. 14), the Commission simultaneously entered a separate order instituting an "investigation" into the "lawfulness" and "reasonableness" of the proposed rates (R. 21). To the extent that appellants rely upon the investigation instituted by the latter order (App.

Section 4 permits the Commission, after investigation and "in special cases," to grant relief from the long-and-short haul prohibitions, provided that the lower long-haul rate is reasonably compensatory, and provided further that such relief is not granted to meet "merely potential" water competition. In issuing the temporary fourth section order here involved, the Commission made no explicit findings in terms of the foregoing statutory criteria. The order merely recited that it was made "[u]pon consideration of the matters and things involved" in the fourth section application, "which application, as amended, is hereby referred to and made a part hereof" (R. 14).

We concede that, because of the absence of any findings that the statutory criteria for fourth section relief were met, the Commission's order granting temporary relief cannot stand. We recognize that, at least in contested cases in which there is objection to the application for relief, the Commission, in order to grant such relief, must make findings showing

Br. 15, 31-32), they confuse a proceeding under Sections 13(2) and 15(7) concerning the general reasonableness of rates with a proceeding under Section 4 involving relief from the long-and-short haul prohibitions. The standards in the two proceedings are quite different. A rate may be reasonable under all other criteria, and yet be illegal under Section 4 because of a forbidden differential between the long and the short-haul rates; conversely, such a differential may satisfy the criteria of Section 4, and yet the long-haul rate itself may violate the Act because it is unreasonable or discriminatory. See *Seatrail Lines, Inc. v. United States*, 168 F. Supp. 819, 824 (S.D.N.Y.); cf. *Davis v. Portland Seed Co.*, 264 U.S. 403. Because of this basic difference, the pendency of a general rate investigation casts no doubt upon the validity of relief granted under Section 4.

that, to the degree necessary to justify temporary relief, the statutory criteria have been satisfied.¹²

The Commission's practice in making findings in connection with temporary fourth section relief has varied. At an early period, it made findings in issuing all such orders. As time went on, however, and the volume of such temporary authorizations greatly increased, the Commission fell into the practice of granting such authority in the form followed in the instant case. In recent years, however, several judicial decisions have held this practice invalid,¹³ and as a result, the Commission has changed its practice

¹² There are two areas, however, in which we think it clear that the Commission need not make specific findings in connection with the grant of temporary fourth section relief.

1. Where a railroad voluntarily establishes reduced rates for certain shipments into a disaster area, as specifically authorized by Section 22, the Commission grants temporary fourth section relief without purporting to find that such reduced rates are reasonably compensatory. To require such a finding would frustrate the beneficent purposes of Section 22.

2. When the Commission permits the railroads to put into effect a general rate increase, it finds it necessary to grant general temporary fourth section relief for a specified period during which the railroads are directed to identify and eliminate violations of Section 4(1). In this situation, it would be impossible for the Commission to make meaningful specific findings in terms of the criteria of Section 4(1). See *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487, 491, 492-493, 495.

In uncontested fourth section cases, the Commission ordinarily does not make any findings. Many or most of such cases involve minor or technical violations of Section 4 in which no one other than the particular carrier concerned has any interest.

¹³ *Dixie Carriers, Inc. v. United States*, 143 F. Supp. 844 (S.D. Tex.); *Seatrain Lines, Inc. v. United States*, 168 F. Supp. 819 (S.D.N.Y.).

again. The Commission currently does make findings when it grants temporary relief in contested cases. The type of findings that the Commission now makes is illustrated in the recent temporary fourth section authorization set forth in Appendix A, *infra*.

Since the Commission's temporary fourth section order is invalid for lack of findings, we think it unnecessary for the Court to consider the two other grounds on which appellants attack it, namely, (1) the failure to hold a hearing, and (2) the alleged inconsistency between granting temporary relief and simultaneously instituting an investigation of the permanent application, when the Act permits relief only "after investigation." But in view of appellants' attack on the Commission's general practice of issuing temporary orders under these circumstances, and the further fact that one of the grounds upon which they argue that the case is not moot is the need for a determination of the validity of that practice, we shall show that neither challenge has merit.

As noted in the Statement (*supra*, p. 7), the Commission has been granting temporary fourth section relief since the long-and-short haul provision was first enacted in 1887 as part of the original Interstate Commerce Act. There have been repeated attempts by the railroads to repeal or modify its prohibitions, primarily on the ground that it unduly restricts their ability to compete with water carriers. Conversely, the water carriers have sought to strengthen the prohibitions, on the ground that they have not been adequate to protect them against predatory rate practices by the railroads. As we shall show, the history of

Congressional action on these conflicting proposals supports the validity of the Commission's settled practice of (1) granting temporary relief without a hearing and (2) simultaneously instituting a formal general investigation and a hearing on the application for permanent relief.

A. A FORMAL HEARING NEED NOT PRECEDE A GRANT OF TEMPORARY
FOURTH SECTION RELIEF

In contrast to many other provisions of the Interstate Commerce Act,⁶ Section 4(1) does not require the Commission to hold a "hearing" before it acts, but only to conduct an "investigation." The distinction is not inadvertent. For the very next paragraph of the statute, Section 4(2), provides that once long-haul rates have been reduced under Section 4(1), they may not be raised unless, "after hearing," the Commission finds that such proposed increase rests upon changed conditions other than the elimination of water competition. The use of these two distinct terms in different sections of the Act, and particularly in different subdivisions of the same section, demonstrates that the "investigation" contemplated by Section 4(1) is not the trial-type "hearing" required for other purposes. This is the holding of the only district court decision on this issue, *Seatrain*

⁶ 49 U.S.C. Sections 1(14)(a) (car service rules), 1(15) (same), 1(19) (extension and abandonment), 3(1a) (export rates), 5(1) (pooling agreements), 5(2)(b) (mergers), 5(7) (same), 5(16) (operation of competing water carrier), 13(3) (State-authorized rates), 15(1) (rate investigations), 15(3) (joint rate divisions), 15(6) (same), 15(7) (new rate investigations), 15(18) (payments to shippers), 16(1) (reparations), 19a(i) (valuations).

Lines, Inc. v. United States, 168 F. Supp. 819 (S.D. N.Y.). Cf. *Jordan v. American Eagle Fire Insurance Co.*, 169 F. 2d 281 (C.A.D.C.). There are contrary dicta, cited by appellants (Brief, p. 32), in *Louisville & N. R. Co. v. United States*, 225 Fed. 571, 580 (W.D. Ky.), affirmed, 245 U.S. 463, and *Dixie Carriers, Inc. v. United States*, 143 F. Supp. 844, 854 (S.D. Tex.), judgment vacated and case remanded with directions to dismiss, 355 U.S. 179.

The distinction between "hearing" and "investigation," moreover, is one which Congress has repeatedly considered in its study of Section 4. The history of this consideration shows that Congress was repeatedly advised of the Commission's practice of granting temporary fourth section relief without hearing, that it rejected proposals to amend the Act to require such hearings, and that it therefore must be deemed to have acquiesced in the Commission's settled view that the "investigation" required by Section 4 does not include an evidentiary hearing.

In 1923 a Senate resolution directed the Commission to report the following information about its administration of Section 4 since 1906:

(a) The number of applications in special cases for relief from the operation of such section filed with the commission, granted by the commission, granted by the commission after investigation, including hearing, denied by the commission, or denied by the commission after investigation, including hearing * * *.

The Commission's response¹² showed that of almost 10,000 applications on which final action was taken after investigation, hearings had been held on less than 1400.

One week after the Commission filed its report, the Senate Interstate Commerce Committee held hearings on a bill to amend Section 4.¹³ This bill would have prohibited the Commission, except in cases of emergency such as drought or disaster, from granting fourth section relief except "after public hearing." Members of the Commission who testified on the proposed bill were divided in their views. Chairman Hall, speaking for the majority, noted that the Commission had granted without a hearing "what is sometimes called temporary relief, or interim relief, pending the determination of the main question,"¹⁴ and said that such temporary relief not only was required for orderly regulation because of a large number of applications but was warranted by the factual showings made in the applications provisionally granted.¹⁵ Commissioner Campbell, however, stated his personal view that the Commission had exceeded its powers in granting temporary relief and in proceeding without hearings.¹⁶

The Committee reported the bill favorably, concluding that "the continuance of such policy [of failing to

¹² Administration of Section 4 of the Interstate Commerce Act, 87 I.C.C. 564.

¹³ S. 2327, 88th Cong., 1st Sess.

¹⁴ Hearing on S. 2327 Before the Senate Committee on Interstate Commerce, 88th Cong., 1st Sess., 365.

¹⁵ *Id.* at 462-463. See also the Commission's letter to the Committee, *id.* at 875-885.

¹⁶ *Id.* at 5-7.

hold hearings] on the part of the Interstate Commerce Commission can only be stopped by a strict prohibition."²⁰ The bill passed the Senate,²¹ but was never enacted into law.

After 1924, the Commission continued its practice of granting temporary relief, and of disposing of applications for both temporary and permanent relief without hearing where none was requested.²² The railroads, however, continued to urge repeal of Section 4, partly on the ground of delays in the granting of relief.²³

In 1938, Commissioner Eastman testified before the Senate Commerce Committee, in hearings on bills to amend Section 4, that temporary relief was being granted in a large number of cases in an average of 23.8 days from the application.²⁴ This short period clearly did not allow for formal hearings. Congress was impressed with the complaint of the railroads that they could not file tariffs for the proposed rates until after Section 4 relief had been granted, and that it was then necessary to wait an additional 30 days (under Section 6(3)) before the reduced rates could become effective. The hearings resulted in the proviso to Section 4 that permits the railroads to file

²⁰ S. Rep. No. 302, 68th Cong., 1st Sess., 5.

²¹ 65 Cong. Rec. 8888.

²² See 4 Sharfman, *The Interstate Commerce Commission* (1937), 245-246.

²³ See Hearing on H.R. 1668 Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., 18-22, 446; Hearings on S. 1356 and H.R. 1668 Before the Senate Committee on Interstate Commerce, 75th Cong., 3d Sess., 1-2, 796-797.

²⁴ Hearings on S. 1356 and H.R. 1668, *supra*, at 797.

changes in the affected tariffs together with applications for relief under that section, and authorizes the grant of relief effective on one day's notice.²³ The Senate Committee report on the bill stated that its purpose was "to permit those rates which involve a departure from the long-and-short haul clause, but which are approved by the Commission, to become effective at an earlier date than is possible under present procedure."²⁴

The Commission's practice of granting temporary relief without hearing was described in detail in 1941 by the Attorney General's Committee on Administrative Procedure.²⁵ Three years later, it was again fully explained in a report submitted to the President and Congress by the Board of Investigation and Research, a three-man board created by the Transportation Act of 1940 and appointed by the President.²⁶ The latter report, after describing the Commission's practice in detail—the identical practice that was followed in this case—referred to 18 cases decided by the Commission in 1940 and 1941 in which it granted temporary relief without a hearing and, after hearing, entered final orders.²⁷ An except from that report is set forth in Appendix B, *infra*, pp. ~~50-57~~ 52. ^R Since 1940, the only change in Section 4 has been to relax its prohibitions; a proviso permitting carriers operating over certain circuitous rail routes to meet

²³ 54 Stat. 904.

²⁴ S. Rep. No. 433, 76th Cong., 1st Sess., 32.

²⁵ S. Doc. No. 10, Part 11, 77th Cong., 1st Sess., 46-47.

²⁶ H. Doc. No. 678, 78th Cong., 2d Sess., 187-188.

²⁷ *Id.*, at 189.

the charges of carriers operating over a more direct line was added in 1957.⁷⁰

In 1960, the water carriers caused to be introduced a bill which would have required, on the protest of a water carrier, a hearing before a railroad could be granted Section 4 relief.⁷¹ Testifying on the bill, Chairman Winchell of the Commission vigorously opposed its restrictions on Commission powers, largely on the ground that the delays it would entail would bar the grant of timely relief to prevent diversion of existing railroad traffic to other modes of transportation.⁷² The bill was never reported by the Committee, and Section 4 still requires only an "investigation"—not a "hearing"—before relief may be granted.

In sum, Congress has not only consistently refused to require the Commission to hold hearings before granting Section 4 relief, but has specifically acted to shorten the very procedure whose failure to include hearings has provoked such extended controversy. Although the testimony given before Congress in 1937 and 1938 showed that the Commission had not altered its practice as reported 15 years earlier, Congress proceeded to integrate the procedures under Section 4 and for filing tariffs, in order to expedite still further the procedures for obtaining fourth section relief. This action by Congress to speed up the grant of fourth

⁷⁰ 71 Stat. 292.

⁷¹ S. 1881, 86th Cong., 1st Sess.

⁷² Hearings on the Decline of Coastwise and Intercoastal Shipping Industry Before the Merchant Marine and Fisheries Subcommittee, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., 568.

section relief is inconsistent with any intent to require that a hearing precede such relief. The Congressional intent to ease the burden which Section 4 imposes on the railroads, rather than to increase it (which requiring a hearing would cause), is also shown by the recent exemption of circuitous rail routes from the prohibition. In short, the traditional practice of granting fourth section relief without formal hearings has received the "*de facto* acquiescence and ratification" of Congress. Cf. *Power Reactor Co. v. Electrical Workers*, 367 U.S. 396, 408-409; *United States v. Bergh*, 352 U.S. 40, 46-47.

B. THE COMMISSION MAY GRANT TEMPORARY FOURTH SECTION RELIEF AFTER AN INFORMAL INVESTIGATION, EVEN THOUGH IT SIMULTANEOUSLY INSTITUTES A FORMAL INVESTIGATION OF THE APPLICATION FOR PERMANENT RELIEF

The Act authorizes the Commission to grant fourth section relief only "after investigation." Appellants argue (Br. 31-32, 36) that the Commission's initiation of a formal investigation of the application for permanent relief at the same time that it granted temporary relief, shows that the Commission had not made the requisite statutory "investigation" when it granted temporary relief. This argument overlooks a basic distinction between the two types of investigation, and fails to recognize the well-established authority of administrative agencies to take action that, although itself meeting the statutory standards, may be subject to reconsideration after further examination and study. (To the extent that the argument rests on the claim that the statutory "investigation" includes an

evidentiary hearing (App. Br. 32-33), we have already answered it in Point II A, *supra*, pp. 35-41).

As we have pointed out in the Statement (*supra*, p. 6), the Commission, when it institutes a formal investigation (which includes a hearing) of an application for fourth section relief, frequently gives temporary interim relief. The Commission decides whether to grant temporary relief on the basis of the application, the protest, and any comments by interested parties. As shown by the recent order granting temporary relief (see Appendix A, *infra*), the Commission will not do so unless it concludes that the statutory criteria governing fourth section relief are satisfied, namely, that there is a "special case" (i.e., one in which the lower long-haul rates are designed to meet competition), that such long-haul rates are reasonably compensatory, and that, if such rates are designed to meet water competition, the latter is actual and not merely potential. If the Commission cannot find that these standards are met, it does not grant temporary relief.

The application for fourth section relief is a lengthy document, which is required to provide detailed information on all significant aspects of the proposal (see 49 C.F.R. 143.75-143.85). It supplies the Commission with sufficient data to enable the agency to make an informed judgment whether temporary relief would be consistent with the standards of Section 4. The Commission gives the application and related papers careful and detailed study and consideration. Such study and consideration constitute an adequate "investigation," within the meaning of

Section 4, to justify granting temporary relief where the Commission concludes that the statutory criteria are satisfied.

The formal investigation and hearing of the application for permanent relief is designed to permit further exploration of the issues than was possible in the Commission's consideration of the need for temporary relief. In the formal investigation, interested parties can present evidence and develop fully all the facts relating to the proposed rate schedule. But the initiation of such formal investigation provides no basis for implying that the earlier informal investigation, on the basis of which the Commission granted temporary relief, was in any sense inadequate, or failed to meet the statutory requirement of "investigation." It merely indicates that the Commission will reexamine the original grant of temporary relief, on the basis of the record made in the subsequent hearing, to decide whether the relief should be made permanent.

Such subsequent reconsideration is not a mere formality. On occasion, the Commission has denied permanent relief after initially granting temporary relief. See, e.g., the *Dixie Carriers* case, *supra*, pp. 20-21; *Steel Pipe From the East to the Southwest*, 301 I.C.C. 203.

The Commission's practice in granting temporary relief in such circumstances is neither novel nor without judicial support. So-called "conditional grants" of operating authority are frequently made by administrative agencies, even though there is no specific authorization therefor in the regulatory statute. See,

e.g., *Community Broadcasting Co. v. Federal Communications Commission*, 274 F. 2d 753 (C.A.D.C.) (conditional grant of broadcasting authority pending comparative hearing on assignment of frequencies).

This Court's decision in the *New England Divisions Case*, 261 U.S. 184, supports the validity of the Commission's practice of granting temporary relief upon a thorough informal investigation of the proposal, subject to further consideration upon completion of the formal investigation. That case arose under Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)), which authorizes the Commission to prescribe, "after full hearing," the divisions of joint rates among carriers who are parties to the rates. The railroads of New England instituted proceedings before the Commission to obtain larger portions of the rates on freight moving between that section and the rest of the country. After lengthy hearings, the Commission increased the divisions of the New England railroads by 15 percent. The order "was to continue in force only until further order of the Commission. And it left the door open for correction upon application of any carrier in respect to any rate" (261 U.S. at 187).

One of the grounds upon which the order was challenged was that it (pp. 199-200)—

directs a transfer of revenues of the western carriers to the New England carriers, pending a decision in the matter of divisions; that Congress has not granted authority to take such provisional action; and that, hence, the order is void. The argument is, that under § 15(6),

the Commission may prescribe divisions only when, upon full hearing, it is of opinion that those existing are, or will be, unjust, unreasonable or inequitable; that in such event it shall prescribe divisions which are just, reasonable and equitable; and that the provisional character of the order demonstrates that the hearing has not been a full one.

In rejecting this argument a unanimous Court, speaking through Mr. Justice Brandeis, pointed out (p. 200) that “[w]hether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon.” The Court stated (p. 201):

A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision, than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

The reasoning of the *New England Divisions Case* is equally applicable to the present case. If Mr. Justice Brandeis' language is paraphrased, and then

applied to the Commission's practice of granting temporary authorization by substituting the word "investigation" for the words "full hearing," it would read as follows:

The Commission's informal investigation, made before granting temporary relief, constitutes the kind of investigation required by Section 4, even though it does not enable the Commission to dispose of the issues completely or permanently; and although the Commission is convinced, [or at least assumes,] when entering the order thereon, that, upon further investigation, some changes in it will [or may] have to be made. Whether the kind of investigation made by the Commission satisfied the statute must be determined by the character of the investigation, not by that of the order entered thereon.

The Commission's long-standing practice of granting temporary relief, pending a hearing on permanent relief, is also supported by the history of Congressional knowledge of, and acquiescence in, such practice. As we have shown (*supra*, pp. 36-41), the practice was frequently called to the attention of Congress, but the legislature rejected all attempts to require a hearing prior to the grant of temporary relief.

CONCLUSION

The judgment of the district court dismissing the case as moot should be affirmed. If this Court concludes, however, that the case is not moot, the appropriate disposition, in view of the government's admission that the order granting temporary relief is invalid for lack of findings, would be to reverse the judgment and remand with instructions to vacate the Commission's order.

Respectfully submitted.

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OCTOBER 1961.

APPENDIX A

Fourth Section Order No. 19540

Order

At a Session of the Interstate Commerce Commission, Fourth Section Board, held at its office in Washington, D.C., on the 10th day of May, A.D. 1961

COMMODITY RATES—SEA-LAND SERVICE, INC.

By fourth-section application No. 36983, as amended, Sea-Land Service, Inc., for itself and on behalf of motor carriers named in the application, applies for authority to establish and maintain a rate of 121 cents per 100 pounds, minimum 70,000 pounds, for the transportation of synthetic plastic materials, in earloads, as more fully described in the application, from Orange, Tex., to Port Newark, N.J., without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

By a petition dated May 2, 1961, Seatrain Lines, Inc., seeks denial of fourth-section application No. 36983, as amended.

Seatrain Lines, Inc., contends that applicants' proposal to maintain from Houston, Tex., to Port Newark, N.J., and from Orange, Tex., to Philadelphia, Pa., and Baltimore, Md., rates higher than from more distant Orange, Tex., and to more distant Port Newark, N.J., has not been justified; that the proposed rate is lower than necessary to meet the competition now existing at Port Newark, N.J., or the competition now existing between Port Newark, N.J.,

and Seatrain Lines, Inc., port of Edgewater, N.J.; and that the proposed rate will not return earnings which will be reasonably compensatory for the service performed.

A full investigation of the matters and things submitted in this proceeding has been made. Consideration has been given to the application, as amended, to the protest of Seatrain Lines, Inc., and to the reply of Sea-Land Service, Inc., to that protest.

With respect to the matter of competition at the intermediate points of Houston, Tex., Philadelphia, Pa., and Baltimore, Md., it appears that the competitive situation existing between the Sea-Land Service, Inc., port of Port Newark, N.J., and the Seatrain Lines, Inc., port of Edgewater, N.J., either does not exist at the intermediate points, or where such competition does exist the rates over the competing routes have been equalized.

In consideration of the question of competition at Port Newark, N.J., raised in the protest, it is clear that the prayer for relief in application No. 36983 is not based on such competition, but on the competition between Sea-Land Service, Inc., port of Port Newark, N.J., and the Seatrain Lines, Inc., port of Edgewater, N.J. In establishing to Port Newark, N.J., a rate approximately the same as its competitor's costs to Edgewater, N.J., it does not appear that Sea-Land Service, Inc., is engaging in destructive competition, as its receiver at that point has stated that, without an approximate equalization of costs, it will be necessary to eliminate its warehousing arrangements at Port Newark, N.J., and reestablish them at a point nearer Edgewater, N.J., so it can take advantage of the lower costs of Seatrain Lines, Inc. It further appears that, if Sea-Land Service, Inc., does not accomplish such an approximate equalization of costs, it will lose its present traffic to Port Newark, N.J.

With respect to the reasonably compensatory nature of the proposed rate, it is found that the fully distributed costs of applicant carriers for the service to be performed, based on a weight of 70,000 pounds, are 111 cents per 100 pounds, as compared to the proposed rate of 121 cents per 100 pounds, minimum 70,000 pounds. Earnings which exceed fully distributed costs must be considered as reasonably compensatory.

Upon consideration of the matters and things involved in application No. 36983, as amended, in the protest dated May 2, 1961, filed by Seatrain Lines, Inc., and in applicants' reply to that protest, which application, protest, and reply are hereby referred to and made a part hereof, it appears that a grant of the relief prayed is warranted, therefor:

It is ordered, That, effective May 15, 1961, to the extent permitted by the statute, and until the effective date of the further order to be entered after hearing to be held in application No. 36983, as amended, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct route, for the transportation of synthetic plastic materials, in carloads, minimum 70,000 pounds, as more fully described in the application, from Orange, Tex., to Port Newark, N.J., a rate of 121 cents per 100 pounds, as proposed in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination on rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in

conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX B

Excerpt from the *Report on Practices and Procedures of Governmental Control*, by the Board of Investigation and Research (H. Doc. 678, 78th Cong., 2d Sess.), pp. 187-188:

When it is found upon preliminary examination of an application that the facts and circumstances presented appear to warrant the granting, temporarily, of the relief prayed, or some measure of relief, pending further investigation and possible assignment for hearing, a memorandum report is prepared by the Board and submitted to Division 2 with the Board's conclusions and recommendation that such relief be granted. The purpose of the temporary relief is to permit the carriers to proceed immediately with the establishment of rates in connection with which the relief prayed appears, *prima facie*, to be justified. * * *

Section 4 was revised by the Transportation Act of 1940, a clause being added which provides that tariffs proposing rates subject to this section may be filed at the same time that application for fourth section relief is made. This new clause has made the matter of temporary relief important in connection with a large number of applications. Under the provisions of section 6 of the act, tariffs become effective, unless suspended, 30 days after filing with the Commission. It is necessary, therefore, to give expedited consideration to applications covering rates included in tariffs contemporaneously filed, in order to take some action upon them, if possible, before the expiration of the 30-day period. If such an ap-

plication cannot be disposed of within that time, or if the relief prayed is found to be not justified, the new tariff must be suspended to prevent rates which violate section 4 from going into effect. As it is frequently not possible to complete the necessary investigation of such applications within the short time available, temporary relief must be granted in those instances in which it appears warranted by the circumstances, until the investigation can be concluded.

In a considerable number of cases it will appear, without need of prolonged investigation of the facts and circumstances presented in the application, either that a special case has been established justifying relief from the provisions of section 4 as prayed, subject to such conditions as the Commission may find to be appropriate, or that there is no adequate ground for relief. These cases are disposed of without hearing, and since the decision will be reached quickly it is not necessary to consider the matter of temporary relief. Of the 125 applications tabulated below, 64 involved neither hearings nor action on temporary relief and were disposed of in an average of 22.1 days each. * * *

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

**A. L. MECHLING BARGE LINES, INC., et al.,
Plaintiffs-Appellants,**

v.

**UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,**

**THE PENNSYLVANIA RAILROAD COMPANY, et al.,
Intervening Defendants-Appellees.**

On Appeal from the United States District Court for the Eastern
District of Missouri, Eastern Division.

**BRIEF
OF THE INTERVENING RAILROADS-APPELLEES**

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IN THE
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No. 41

A. L. MECHLING BARGE LINES, INC., et al
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**UNITED STATES OF AMERICA and INTERSTATE
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THE PENNSYLVANIA RAILROAD COMPANY, et al
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*On Appeal From the United States District Court For The
Eastern District of Missouri, Eastern Division.*

**BRIEF OF THE INTERVENING
RAILROADS—APPELLEES.**

JURISDICTION.

This action was brought to enjoin and set aside an order of the Interstate Commerce Commission, and for a declaratory judgment as to the powers of the Commission. The decree of the three-judge District Court dismissed the case as one presenting no controversy (R. 64-65). An appeal was taken to this Court on October 21, 1960 (R. 65-67). On April 3, 1961, the Court ordered that further consideration of the question of its jurisdiction be postponed to the hearing on the merits.

QUESTIONS PRESENTED.

1. Whether the court below erred in concluding that the proceeding should be dismissed as no longer presenting a justiciable controversy in view of the appellee railroads' Chicago-to-the-East reduced rates and withdrawal of their application for Fourth Section relief.

2. In the event that the first question is answered in the affirmative—

 A. Whether an application for declaratory relief may properly be made to a three-judge court established pursuant to the Urgent Deficiencies Act.

 B. Whether appellants have exhausted their administrative remedies against the injuries of which they complain.

3. In the event both prior questions are answered in the affirmative—

 A. Whether a hearing is a prerequisite to the Commission's issuance of an order granting relief from the long-and-short haul provisions of Section 4(1) of the Interstate Commerce Act.

 B. Whether a temporary Fourth Section order is invalid unless it contains findings.

STATUTES INVOLVED.

Sections 4(1), and 13(1) of the Interstate Commerce Act (49 U.S.C. §§ 4(1) and 13(1)), and Section 4(b) of the Administrative Procedure Act (5 U.S.C. § 1003(b)) are reproduced in the Appendix.

STATEMENT OF THE CASE.

Prior to the granting of the application here in issue, the Western railroads had in effect local rates from Northern Illinois grain producing area to Chicago. The railroads operating east of Chicago also had in effect reshipping rates from Chicago to the East (R. 3-4). These proportional rates from Chicago normally would be combined with the rates from northern Illinois to form through combination rates from origins in northern Illinois to destinations in the East. However, because of the long-and-short-haul provision of Section 4 of the Interstate Commerce Act, the reshipping rates were subject to the restriction that the through combinations could be no lower than the local rates from Chicago to the involved destinations (R. 304). Amounts necessary to increase the through combinations to the level of the Chicago-to-the-East local rates were added to the reshipping rates.

In December 1958, the railroads published, to become effective January 10, 1959, tariffs which would permit the use of the Chicago reshipping rates in combination with the rates into Chicago without observing the level of the local rates from Chicago as minima for the through rates (R. 4).¹ Since the local rates from Chicago were higher than these combination through rates and would be in

¹ In *Interstate Commerce Commission v. Mechling*, 330 U.S. 567, the Court required that these reshipping rates apply on grain arriving at Chicago by barge. The Court announced (p. 577):

"Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge grain than for carrying ex-lake or ex-rail grains to and from the same localities.
* * *

These tariff provisions permit the Eastern railroads to charge for their transportation services from Chicago to the East the same rates on grain arriving at Chicago by rail as they are required, by *Interstate Commerce Commission v. Mechling*, 330 U.S. 567 to charge for grain arriving at Chicago by barge which originates in the same Northern Illinois origin territory.

violation of Section 4 of the Act, the involved Fourth Section applications were filed seeking authority to maintain higher rates from intermediate points than the published combination through rates from the more distant points (R. 5). The original verified application of 37 pages set forth the bases for the relief sought, including facts to demonstrate that the rates were reasonably compensatory. Written protests were filed by interested shippers and barge lines, including the present appellants (R. 5). However, on January 9, the Commission refused to suspend the tariff publication, instituted an investigation into the reasonableness of the through combination rates, and issued the Fourth Section Order No. 19059—the temporary order here at issue—pending a hearing to determine whether further continuing relief should be granted (R. 6-7). Applicants filed with the Commission a petition for reconsideration and vacation of Fourth Section Order No. 19059. On March 10, 1959, that petition was denied (R. 22). On February 18, 1959, the Commission assigned for hearing on March 16, 1959, the matters involved in Fourth Section Application No. 35140. After several postponements made at the request of the parties, a hearing was held on July 7, 1959, through July 16, 1959 (R. 7). On September 1, 1959, the rail carriers petitioned for further hearing and consolidation with two additional Fourth Section Applications which involved the same relief from additional origin points (R. 9-10). Appellants opposed the request for consolidation and further hearing (R. 9). By order dated October 28, 1959, the Commission granted the petitions of the rail carriers (R. 27-28).

In November 1959, while this matter was still pending before the Commission, applicants brought this action in the District Court (R. 1-13). The action sought (1) to enjoin, set aside, annul and suspend the fourth section order of the Commission; and (2) to enter a declaratory judgment upon certain questions of law (R. 12-13).

On March 28, 1960, applicant railroads advised the Commission and all interested parties that they had established, effective March 10, 1960, reduced local rates Chicago-to-the-East which made unnecessary the relief granted by Fourth Section Order No. 19059, as supplemented (R. 45-46).² By notice dated March 31, 1960, the Commission advised* that the applications were considered withdrawn (R. 48). There are therefore no longer outstanding Fourth Section departures and the temporary Fourth Section authority and Fourth Section Order No. 19059, as supplemented, are no longer effective. Following this reduction in the local rates and the acknowledged withdrawal of the applications, both appellees filed motions to dismiss on the grounds that the issues were moot and that declaratory judgment relief would not lie (R. 40-49).³ The court concluded that the cause of any controversy that existed had been terminated by the publishing of rates which fully conformed in all respects to the requirements of Section 4 of the Interstate Commerce Act (49 U.S.C. § 4) and dismissed this action (R. 64-65).

² The published reduced local rates Chicago-to-the-East were protested by Appellants. Appellants alleged that the reductions were made to avoid the necessity of obtaining Fourth Section relief. That this was the reason for the reduction the rail carriers did and do emphatically deny. The Chicago-to-the-East rate reductions were forced by truck competition.

³ On June 25, 1960, appellants filed, with the lower court, their Motion for Summary Judgment. This motion was filed more than two months after the filing of and one day prior to oral argument on the motions to dismiss. Because of the pending motions to dismiss, the appellants' motion, with appended affidavits, was never considered by the court or the appellees. For the same reason no counter affidavits were filed.

ARGUMENT.

SUMMARY OF ARGUMENT.

I.

A. Appellants' prayer for an injunction to enjoin, set aside, annul and suspend Fourth Section Application No. 19059 has become moot, since the subsequent rate publications by appellee railroads removed all Fourth Section violations, and the applications for relief were formally withdrawn. See, e.g., *Atchison, Topeka & S. F. v. Dixie Carriers*, 355 U.S. 179.

B. Similarly, appellants' prayer for a declaratory judgment now lacks any "actual controversy." No "declaration" could now deal with other than an abstract proposition and a hypothetical, academic case. See *Aetna Life Ins. Co. v. Hayworth*, 300 U.S. 227. Moreover, declaratory relief is improper in any event, in light of the provisions of the Urgent Deficiencies Act providing the sole statutory method of review of orders of the Interstate Commerce Commission. See *Public Service Comm'n of Utah v. Wycoff*, 344 U.S. 237.

C. In any event, appellants have no justiciable interest in this proceeding, since they are directly affected, not by the order granting temporary Fourth Section relief, but only by the Commission's conclusion that it would not suspend the rates published to become effective on January 10, 1959. Plaintiffs have failed to initiate or to exhaust the appropriate statutory remedies available to them to challenge this latter action by the Commission. See *United States v. Merchants & M. Traffic Ass'n*, 242 U.S. 178, 188; *Seatrain Lines, Inc. v. United States*, 168 F. Supp. 819 (S.D.N.Y. 1958).

II.

On the merits, plaintiffs' complaints are groundless. Their contention that the Commission must, in addition to making an investigation, have a formal hearing, is sustained neither by the Administrative Procedure Act nor by Section 4(1) of the Interstate Commerce Act. *Seatrail Lines, Inc. v. United States, supra*. The latter section, in contrast to other sections of the Interstate Commerce Act which condition Commission action upon hearing, permits Commission action "after investigation". Moreover, this has been the consistent construction of the section by the Commission over many years. Cf. *New Haven R.R. v. Interstate Commerce Commission*, 200 U.S. 361, 401-402.

Appellants' further contention that the Commission order is invalid because it lacked findings, fails for the same reason, since Section 8(b) of the Administrative Procedure Act upon which they rely does not apply except in cases where a hearing is required to be held.

Finally, appellants' contention that they have been denied due process ignores the fact that they have adequate administrative remedies, including the right to a hearing under other sections of the Act, which they have elected not to invoke. *United States v. Merchants & M. Traffic Ass'n, supra*.

Since the Court has postponed consideration of the question of its jurisdiction to the hearing of the case, we first address ourselves to that topic. Thereafter, however, we shall consider the several other grounds which may be relied upon to support the conclusion reached by the court below that the action should be dismissed.

I.

THE COURT IS WITHOUT JURISDICTION OF THIS MATTER SINCE THERE IS NO JUSTICIABLE CONTROVERSY BEFORE IT.

Appellants seek to sustain the jurisdiction of this Court both with respect to this prayer for injunctive relief, and with respect to their prayer for a declaratory judgment. They are, we submit, in error in both respects.

A. The Issue of Injunctive Relief Has Been Rendered Moot by Changed Circumstances.

Appellants' prayer for injunctive relief sought an order which would enjoin, set aside, annual and suspend Fourth Section Order No. 19059 of the Interstate Commerce Act. This order was permissive only, *United States v. Merchants & M. Traffic Association*, 242 U.S. 178, and permitted the railroads to maintain higher rates at intermediate points. The March 10, 1960 rate publications by appellee railroads removed all Fourth Section violations, and, coupled with the withdrawal of the applications, made inoperative and terminated the relief afforded by the Fourth Section orders. *Vicksburg, Shreveport & Pac. Ry. v. Anderson-Tully Co.*, 256 U.S. 408; *Lime From C.F.A. Terr. & S.W. to Boute, La.* 294 I.C.C. 616, 618 (1955); *Maggioni & Co. v. A.C.L. R.R.*, 272 I.C.C. 127, 131 (1948). Thus, the orders which appellants seek to enjoin have ceased to be effective and cannot be reinstated; and the issue of an injunction has been rendered moot. *Amalgamated Asso. v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 416; *United States v. Alaska Steamship Co.*, 253 U.S. 113; *Coastwise Line v. United States & Interstate Commerce Commission*, 157 F. Supp. 305 (1957); In three recent cases, the Court has dismissed appeals as moot for substantially similar reasons. *Atchison, Topeka & Santa Fe Railway Co. v. Dixie Carriers*, 355 U.S. 179;

United States v. Amarillo-Borger Express, 352 U.S. 1028; and *Luckenbach Steamship Company, Inc. v. United States*, 364 U.S. 280.

Indeed, appellants have themselves recognized this. Paragraph 19 of their complaint, wherein they admit that "It is possible that the entry of a final order in Fourth Section Application No. 35140 may make this case moot before a final determination of these issues by the Supreme Court of the United States can be obtained, just as other cases in which similar relief has been sought have become moot before the issues could be determined by the Supreme Court." (R. 12-13). Withdrawal of the applications and the termination of their effectiveness in no less measure brings finality to the subject matter.

B. Appellants Do Not Have a Valid Basis for Declaratory Relief.

Appellants are no more successful in their contention that they are still entitled to a declaratory judgment. The questions which appellants seek to make the subject of a declaratory judgment do not involve an actual controversy. Regardless of whether an "actual controversy" had existed with respect to the particular commission action here under review, the controversy terminated upon the withdrawal of the applications and discontinuance of the temporary authority. No "declaration" which the courts could now make would affect the dispute which has now terminated. It is clear that the Court will not decide moot questions or abstract propositions for the government of future cases which cannot affect the result as to the matter in issue in the case before it. *Poc v. Ullman*, 367 U.S. 497, 508; *Local No. 8-6, Oil, Chemical & Atomic Wkrs. v. Missouri*, 361 U.S. 363; *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237; *Amalgamated Association v. Wisconsin Emp. Rel. Bd.*, 340 U.S.

416; *United States v. Alaska Steamship Co.*, 253 U.S. 113; *Mills v. Green*, 159 U.S. 651; and *California v. San Pablo & T.R. Co.*, 149 U.S. 308.

In *Aetna Life Insurance v. Hayworth*, 300 U.S. 227, the Court said (p. 240):

"A 'controversy' in this sense must be one that is appropriate for judicial determination. * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."

Just as a lack of a subject matter renders moot the prayer for an injunction, the same lack is equally fatal to a declaratory judgment proceeding.

It would serve no useful purpose to discuss in detail the cases to which appellant refers (pp. 17-22), which involve situations in no way comparable to the present one. Suffice it to say, that each of them point up the basic element lacking in this proceeding: *i. e.*, a subject matter to which either an injunction or declaratory order could attach. In the only two involving the Interstate Commerce Commission—*Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, and *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433,—the problem was wholly different. Each involved maximum rate orders of the Commission. By statute, at that time, orders of the Commission were limited to a two-year duration. It was the practice of the Commission, when necessary, to reinstate the order after two years. The Court pointed out that consideration of such an issue ought not to be, as they may be, defeated by short term orders, capable of repetition. In those cases, the very subject matter, *i. e.*, the same involved rate, was likely of being the subject of recurring orders unless the railroads continued to maintain the rates prescribed. This,

of course, is not the case here. There is no likelihood that the local Chicago-to-the-East rates will be increased.

Moreover, there is an independent basis upon which declaratory relief, even if appropriate, must be denied. The provisions of the Urgent Deficiencies Act, 28 U.S.C. §§ 1336, 2284, 2321-25, provide for the sole statutory method of review of the here-involved orders of the Interstate Commerce Commission. The Declaratory Judgment Act, 28 U.S.C. § 2201-2202, cannot be interposed as an alternative method of relief. *Magnolia Petroleum Co. v. Texas Illinois Nat. Gas P. Co.*, 130 F. Supp. 890 (D.C., S.D. Texas, 1948). In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 246, the Court commented "Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review". As the Court recognized, the Senate Judiciary Committee, in recommending Rule 57 of the Federal Rules of Civil Procedure to provide procedures for the declaratory decree, noted (page 243) "A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case."

C. Appellants Have No Justiciable Interest In The "Higher Rates" From The Intermediate Points, and Have Failed to Exhaust Their Proper Administrative Remedy.

Appellants assert that the matter of the validity of the temporary Fourth Section order is not moot since, they contend, it stands as a bar to any action for damages in a suit under Section 8 of the Interstate Commerce Act (49 U.S.C. § 8). Section 4 of the Act (49 U.S.C. § 4) declares that "it shall be unlawful... to charge... any greater compen-

sation . . . for a shorter than for a longer distance . . .” The water carriers' concern is not with the higher rates at the intermediate points, but the rates at the more distant points. Any attack against the latter rate is not under Section 4, but must be under some other sections of the Act. This Court pointed out many years ago in *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 567, that the railroads could have reduced the rates from the intermediate points, rather than seek Fourth Section relief. This was, in fact, what was ultimately done. Regardless of which alternative is followed, appellants are placed in the same competitive situation, for they are interested only in the reduced rate from the more distant points. Appellants are not really directly affected by the order granting temporary relief; what really affected them was the Commission's conclusion not to suspend the rates published to become effective January 10, 1959 (R. 4). See *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487, 495 (D.C. Virginia 1935). The effect of these rates upon appellants is not a matter for consideration under Section 4 of the Act (49 U.S.C. § 4). *Seatrail Lines, Inc. v. United States*, 168 F. Supp. 819, 824 (S.D. New York, 1958).

For this reason, the applicant carriers are the only necessary parties to the Section 4 proceeding. All others are not bound by the orders entered, for they have ample remedy available under Sections 13 and 15 of the Act (49 U.S.C. §§ 13, 15). See *United States v. Merchants & M. Traffic Ass'n, supra*, 188. The Court there noted (*ibid.*):

“And if the rates made by tariffs filed under the authority seem to them [other participants] unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample relief.”

Seatrail Lines, Inc. v. United States, supra, page 825. Since the rates became effective, January 10, 1959, ap-

pellants have not seen fit not to impose the appropriate and exclusive remedy by filing a complaint directly assailing the lawfulness of the reduced terminal rates. In *Seatrail Lines, Inc. v. United States, supra*, the court considered this very point, and stated (page 824):

"Thus insofar as the plaintiff claims discrimination against it resulting from new authorized rates, it has not exhausted its administrative remedies because it has not petitioned for a hearing under Sections 13 and 15 at which such claims would be determined.

• • •

"All questions as to the effect of the rates upon competing carriers, shippers, and affected communities are reserved for determination in proceedings under Sections 13 and 15, where a 'hearing' is expressly required."

Plaintiffs' failure to initiate and exhaust the appropriate statutory remedy must stand as a bar to the relief sought by this appeal. Cf. *United States v. Illinois Central R. Co.*, 291 U.S. 457.

In *Texas and Pacific Ry. Co. v. United States*, 289 U.S. 627, 638, this Court stated, with reference to Section 4, Part I, of the Act:

"The Act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare."

The water carriers, as such, are not shippers who pay or bear the charges, nor do they represent shippers at the intermediate points which may be affected by the higher rates applicable from those points.

II.

THE ACTION OF THE COMMISSION IN GRANTING SECTION 4
RELIEF WAS IN ANY EVENT PROPER.

Appellants cannot, and do not complain that they were not afforded an opportunity to make their views known to the Commission prior to the issuance of the order of which they complain. Indeed, the complaint alleges (R. 5) the filing of numerous protests and petitions by barge lines and shippers, and the filing of responses by the railroads. Rather, appellants' complaint is that the Commission did not accord them a formal hearing—and make findings—prior to the granting of relief from the long-and-short-haul provisions of Section 4(1) of the Interstate Commerce Act.

The Administrative Procedure Act makes it clear that the action of the Commission was an exercise of its "rule-making" function. Section 2(e) of that Act (5 U.S.C. § 1001(e)) defines rule-making as including the process for the "approval or prescription for the future of rates." *Seatrain Lines, Inc. v. United States, supra*, 826. Section 4(b) of the Administrative Procedure Act (5 U.S.C. § 1003(b)) provides as follows:

"**PROCEDURES**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an

agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

Thus, if no hearing is specifically required by Section 4(1) of the Interstate Commerce Act, relief may be authorized by the Commission, in its discretion, without a hearing.

Section 4(1) of the Interstate Commerce Act (49 U.S.C. § 4(1)) insofar as herein pertinent, provides:

"That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances * * *, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section * * *"

The "investigation" specified does not impose the requirement of a hearing before authority is granted. This precise question was before the court in *Seatrail Lines v. United States*, 168 F. Supp. 819-828 (S.D. New York 1958):

"Those protesting a Section 4 application may be given an opportunity to present written data, views and arguments as they were permitted to do here as part of the 'investigation' contemplated by the section. But there is no 'hearing' required * * *."

In arriving at this conclusion, the court noted the contrasting language of the second subdivision of Section 4 (49 U.S.C. § 4(2)) which relates to the increase of rail rates subsequent to a reduction to meet water competition, expressly provides that rail carriers "shall not be per-

mitted to increase such rates unless after hearing it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." This distinction between "after investigation" and "after hearing" is carried out throughout the entire act. The specific imposition of a hearing prior to Commission action is illustrated by Sections 1(14), 1(21), 3(1a), 5(1), 5(2), 5(7), 5(15), 13(a), 15(3), 15(6), 15(7) and 16(1). In other words, when Congress sought to impose a requirement of a hearing, it did so in so many words. It did not do so in Section 4(1).

Moreover, the Commission has consistently, over many years, construed Section 4(1) as not requiring a hearing. As early as March 3, 1923, the Senate requested information from the Commission with respect to applications under Section 4. The Commission's response (set forth in *Administration of Section 4 of the Interstate Commerce Act*, 87 I.C.C. 564 (1924), was as follows:

	Heard	Not Heard	Total Applications
Applications granted in whole or in part after investigation, entirely disposed of:			
Decided prior to February 28, 1920, the date Section 4 was amended by the transportation act	234	4,791	5,025
Decided on and after February 28, 1920 (except applications granted to meet water competition)	66	484	550
Applications granted on and after February 28, 1920, after investigation, to meet water competition	3	1	4

In the year ending June 30, 1959—the year in which the applications here involved were granted—828 orders were entered by the Commission, of which 59 were denial orders, 66 were orders granting temporary relief, and 703 were orders granting continuing relief. A total of 33 involved a hearing. 73d Annual Report of the Interstate Commerce Commission, Fiscal Year Ending June 30, 1959. As the Court has frequently recognized, the construction placed by the Commission on a statute of which it is charged with enforcement is entitled to great weight. This is particularly true where, aware of the administrative interpretation, Congress has reenacted the statute without alteration in the particulars construed. See *New Haven R.R. v. Interstate Commerce Commission*, 200 U.S. 361, 401-402; *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599 (D.C. Iowa 1953).⁴

The distinction between the requirements of an "investigation" and a "hearing" has received judicial recognition. *In re Securities and Exchange Commission*, 84 F. 2d 316, 318 (2d Cir. 1936). In *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 152, the Court held that a statutory direction to an administrative agency to "investigate" did not include the requirement of a formal hearing. See *Seatrail Lines v. United States*, *supra*; *In re Securities and Exchange Commission*, 84 F. 2d 316 (2d Cir., 1936); *Woolley v. United States*, 97 F. 2d 258, 262 (9th Cir., 1938), cert. den. 305 U.S. 614; *Bowles v. Baer*, 142 F. 2d 787, 788-789 (7th Cir., 1944); *Genecov v. Federal Petroleum Board*, 146 F. 2d 596, 598 (5th Cir., 1945), cert. den. 324 U.S. 865; and *Jordan v. American Eagle Fire Insurance Co.*, 169 F. 2d 281, 285-287 (App. D.C., 1948). The *obiter* statement in *Dixie Carriers v. United*

⁴ In 1924, a bill was introduced to amend section 4 of the Interstate Commerce Act, which would have provided for the substitution of the words "after public hearing", in lieu of the then and present words "after investigation." S. 2327, 68th Cong., 1st Sess. This bill was never enacted.

States, 143 F. Supp. 844 (S.D. Tex. 1956); *remanded as moot*, 355 U.S. 176, cannot be accepted. The statement in the *Dixie Carriers* case that an "investigation" under Section 4 shall include a "hearing" appears to be based upon *Louisville & N. R. Co. v. United States*, 225 F. 571, 580 (W.D. Ky., 1915), affm'd, 245 U.S. 463. The issue before the court in the *Louisville & Nashville* case was not whether a hearing is required in Fourth Section matters but rather did the evidence support the Commission's refusal to grant Fourth Section relief, and whether such action was deprivation of property without due process of law. The statement was made by the District Court as a "general observation", and on appeal the Supreme Court did not even mention the "general observation". *Louisville & N. R. Co. v. United States*, 245 U.S. 463.⁵

There is no warrant for suggesting, as appellants do (pp. 31-36) that the Commission may not enter an order

⁵ The rates for which fourth section relief was sought were in effect prior to enactment of the June 18, 1910 amendment to Section 4 of the Act, which required application to the Commission for relief from long-and-short-haul clause. To provide for such rates the June 18, 1910 amendment contained the proviso:

"Provided further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after passage of this act, nor in any case where application shall have been filed before the Commission...until a determination of such application by the Commission."

The effect of a denial of the authority was to require the carriers to make a change or modification in their existing rates, which the Commission can directly require only after a full hearing. See Interstate Commerce Act, Section 15 (1), 49 U.S.C. § 15(1). Under these circumstances, it may be that a hearing was necessary prior to an order which would have the effect of requiring the carriers to change then existing rates. Further, in fact, there had been a full formal hearing and the proceeding before the Commission included a formal complaint. See *Louisville & N. R. Co. v. United States*, *supra*, 465.

granting temporary Fourth Section relief after investigation and at the same time indicate that a formal hearing will be held to determine whether the relief should be made permanent. Section 4 of the Interstate Commerce Act contemplates primarily this type of action. That section states in part:

"* * * That upon application to the Commission such common carrier may in special cases, after investigation, be authorized to charge less for longer than for shorter distances * * *; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section * * *."

As pointed out by the Court in *Skinner & Eddy Corp. v. United States, supra*, 567-568, "* * * Congress provided that the judgment of the Commission should be exercised 'from time to time' to determine 'the extent to which * * * [the] carrier may be relieved from the operation of this section.'"

Fourth Section Order 19059 (R. 14) stands as authority issued *after investigation* and in a special case. As the statute contemplates, the Commission may *from time to time* modify or discontinue the relief granted. The hearing ordered in Fourth Section Application No. 35140 relates to further investigation pursuant to the Commission's power to modify the form of the relief granted, or possibly to discontinue the relief. The statute clearly anticipates further investigation, *from time to time*, by the Commission after the issuance of orders granting Fourth Section relief.

Nor does the fact that the Commission entered into an investigation of "the lawfulness of the rates, charges, regulations and practices contained in" the rate schedules filed December 4, 1958, in any way affect the power of the

Commission to authorize Fourth Section departures. The "investigation" under Section 4(1) of the Act (49 U.S.C. § 4(1)) encompassed only whether a "special" case had been shown. The order of investigation and hearing, I.C.C. Docket No. 32790 (R. 20-21), is the exercise of the Commission's powers under Section 15(7) of the Act, 49 U.S.C. 15(7), encompassing the "lawfulness" of the rates. *Cf. United States v. Merchants & M. Traffic Association*, 242 U.S. 178.

Two other contentions made by appellants may be disposed of briefly. Appellants contend that the Fourth Section orders here at issue are invalid for the reason that they do not contain findings as allegedly required by Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 107(b)). However, Section 8 of that Act is expressly limited by its own terms to "cases in which a hearing is required to be conducted in conformity with Section 7," i. e., only in instances in which there is a statutory requirement of a hearing. *American Trucking Ass'n v. United States*, 344 U.S. 298, 319-320. Hence since, as already stated, a hearing was not required, Section 8(b) of the Administrative Procedure Act has no application.

Appellants also contend that the action of the Commission in granting Fourth Section relief without a hearing denies them due process. The contention is clearly without merit. *United States v. Merchants & M. Traffic Ass'n*, 242 U.S. 178; *Seatrail Lines, Inc. v. United States*, 168 F. Supp. 819, 824 (S.D.N.Y. 1958). As pointed out in those cases, appellants may avail themselves of whatever constitutional right they might have to a formal hearing, either by process of a complaint filed pursuant to the provisions of Section 13(1) (49 U.S.C. § 13(1)), or in an investigation by the Commission pursuant to Section 15(7) (49 U.S.C. § 15(7)). There is plainly no constitutional requirement that the statute afford a party a right to a full hearing before the exercise of the Commission's

powers under Section 4(1). *Cf. Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 595; *Stoehr v. Wallace*, 255 U.S. 39; *American Cold Storage Co. v. City of Chicago*, 211 U.S. 306.

CONCLUSION.

Wherefore, the judgment of the district court dismissing appellants' complaint should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE.

I, Edward A. Kaier, one of the Attorneys for the Railroad Defendants-Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of October, 1961, I served copies of the foregoing Brief on the several parties to the case as follows:

1. A. L. Mechling Barge Lines, Inc., *et al*, Appellants, by mailing a copy, air mail postage prepaid, to their attorneys of record, Edward B. Hays and Wilbur S. Legg, 135 S. LaSalle Street, Chicago 3, Illinois.
2. United States of America, Appellees, by mailing copies, first-class postage prepaid, to the Solicitor General, Washington 25, D.C.; and W. Wallace Kirkpatrick and Richard A. Solomon, Department of Justice, Washington 25, D.C.
3. Interstate Commerce Commission, intervening defendant, by mailing copies, first-class postage prepaid, to Robert W. Ginnane, General Counsel, and H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D.C.

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APPENDIX.

(Statutes Involved.)

Interstate Commerce Act, Sec. 4(1), (49 U.S.C. § 4(1)):

"It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject

only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

Interstate Commerce Act, Sec. 13(1), (49 U.S.C. § 13(1)):

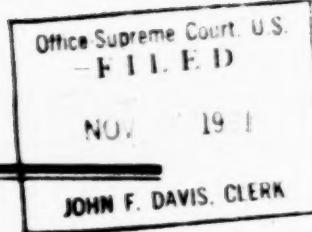
"That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to

the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Administrative Procedure Act, Sec. 4(b), (5 U.S.C. § 1003(b)):

"PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

A. I. MECHLING BARGE LINES INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.

Appellees.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

In their respective briefs on the merits before this Court the Commission and the railroads have taken positions that are no longer identical.

Both maintain here their contention in the court below that this case is moot and that therefore neither injunctive nor declaratory relief may be granted. The railroads continue to ignore the nature of appellants' complaint of the *recurring* injury done them by the *continuing* practice of the Commission of which F.S.O. 19059 is a particular instance. That is to ignore the case presented. In consequence they misdirect their comment and citation.

The government's attitude appears to recognize (Part I, 2, of its Argument, pp. 22-27) that recurring injury from a continuing practice can preserve the Court's jurisdiction over a suit in which such injury is alleged, even when the particular instance of the practice is discontinued under pressure of the litigation.

In view of that, it is difficult to see how the government can join the railroads in the position that this case is moot; especially when the practice of entering such orders over the protests of proper parties without hearing (contemporaneously ordering investigation by hearing) is a practice that admittedly continues, and is admittedly challenged.

The government's argument is that there can be no such recurring injury unless *exactly* the same order can be repeated (Br. 24), thereby proposing a limitation on the doctrine of retained jurisdiction which is not found in the authorities and is contrary to their doctrine. The doctrine of the authorities is that parties cannot be left remediless against like recurring injury by repetition of exactly the same inveterate, illegal practice, just because defendants are able to terminate the effectiveness of any particular instance of the injurious and illegal practice complained of before the prescribed process of judicial review can be completed. Particularly, this is applicable when continuing practices of administrative agencies are challenged as unlawful, since by the termination of any instance of the challenged practice before judicial review is completed such agencies would otherwise be able to create for themselves a no-man's land for unlawful and injurious administrative action by repeated short-term orders, unrestrained by the ultimate judicial control of this Court that Congress provided. The Commission's contention that

it is free to avoid, in this way, final condemnation by this Court of any recurrent, short-term illegality that it does not itself choose to correct unless *exactly* the same order can be repeated "except for the dates" (Br. 24) would recast the plain doctrine of the authorities in terms of triviality to which that doctrine is not addressed.

It is, therefore, incidental and not essential to the application of the doctrine that in fact (contrary to the Commission's frivolous premise) *exactly* the same order can be repeated. The next general rail-rate increase can put the intermediate short-haul rates up to *exactly* the same point from which the railroads reduced them to avoid this judicial review, the water-competitive long-haul rates can be left *exactly* where they were, and the Commission can then enter *exactly* the same Fourth Section order—"except for the dates" and the file-number. It is not that, however, but the considerations enumerated at pages 20-22 of our brief, on which the authorities place the doctrine of retained jurisdiction.

The Commission also suggests that if plaintiffs could recover the damages they have suffered in any event (which it continues to doubt) they can do so *without* setting aside, on this direct review, its orders that unlawfully gave the railroads authority to inflict those damages (Br. 12). It makes no reply, however, to the decisions of this Court that forbid collateral attack on Commission orders. (Our Brief, 24)

The railroads are the parties against whom the suit would be brought in which, the Commission suggests, the effect of its orders could be determined collaterally, without setting them aside here. The railroads do not concede (and predictably would not concede) that these orders

could be collaterally attacked, in view of this Court's decisions that no collateral attack will be allowed.

Moreover, this is interestingly different from the Commission's position before this Court on motion to affirm which, in this respect, was only that because plaintiffs are not shippers they could never recover their damages. (Motion 4-5)

The Commission does not dwell on its suggestion that a court would entertain such collateral attack, apparently for the further and more basic reason that it has now been made apparent that to remit the water carriers to successive proceedings (of any sort, or before any tribunal) for the damages inflicted by unlawfully authorized rates, is not to give water carriers the protection against destructive rail-rate competition (by lower rates for longer water-competitive hauls) that Congress provided by the Transportation Act of 1940, with its injunction to preserve the inherent advantages of the various forms of transportation, prevent destructive competition and construe *all* sections of the Act (including Section 4) so as to effectuate this purpose.

The Commission now concedes, as the railroads, however, do not, that its order was unlawful and that its practice has, of late years, been unlawful in that its orders contained no findings, and that the water carriers thus have not been accorded (in that single respect, it says) the protection that Congress intended by the 1910 amendment of Section 4 against this form of destructive competition. That concession, however, is *not* made by annulling the unlawful orders here directly attacked. And even that limited concession does *not* bind the Commission, whose practice, it says, has *fluctuated over the years* (as the decision of this Court *would* bind it) to observe

a procedure that it admits—for the purposes of this case—to be a required procedure which it has disregarded. If this limited concession were put forward in aid of any contention of mootness, its effect, if it were to succeed in that, whatever its purpose, would be to escape, yet again, a binding determination of the unlawfulness (even in that respect) of the practices the Commission admits by answer that it still followed when *this* action was commenced. (R. 4, 31, 39, Fed. R.C.P. 8 (d).) Such changes, made only under the pressure of the immediate litigation, that do not result in binding determinations, leave the defendants with a burden of proof that "it will never happen again" that no administrative agency can meet, for its personnel at any time can never bind their successors on important questions of their public duty. And the single change that is announced in an appellate brief to have been made pending this litigation does not extend to the whole of the admitted subject-matter of the controversy, which goes to the practice of entering orders authorizing such rail competition to be commenced, in disregard of the long-haul-short-haul prohibition enacted by Section 4 for the protection of water carriers, without completing the investigation that the Commission orders, *viz.*, it goes to the practice of entering such orders *in protested adversary cases* before the hearing.

The railroads present for the first time contentions, in which the government does not join, that appellants have no justiciable interest in the intermediate or short-haul rate (ignoring that Section 4 was enacted for the protection of the competing water carrier against destructive competition by the long-haul rate) and have not exhausted their administrative remedies. Both these contentions are based on a misconstruction of one sentence in Justice Brandeis' opinion in *United States v. Merchants and*

Manufacturers Traffic Association (also known as the *Sacramento Case*) 242 U. S. 178 (1916). As noted above, the railroads refuse to recognize that the appellants here complain of the injury done them by the Commission's continuing practices, a method of entering F.S.O. 19059 and like orders in violation of *Section 4* of the Interstate Commerce Act as amended in 1910 (and in violation of constitutional limitations). "They refuse, that is to say, to face the fact that there is no lawful substitute for the protection of the procedures that the law requires.

Fourth Section orders conclude nothing as to the compliance with the standards of Sections 1, 2, or 3 of the Interstate Commerce Act,¹ at least as to parties who have not participated in the Fourth Section proceedings, and thus those different issues are open and must first be presented to the Commission in proceedings under Sections 13 or 15.² Those were the issues left open by this Court in the *Sacramento Case, supra*. But the Commission's order *does* authorize the rate under Section 4. The issue we raise is that it has not lawfully authorized the rate. On that issue the order silences us everywhere until it is set aside in the only proceeding—this proceeding—in which Congress has allowed it to be reviewed.

The government and the railroads further diverge in their position when the government acknowledges the necessity for findings in the order (and, in that respect only, confesses its invalidity without, however, voiding it so as to remove it as a bar). The railroads, on the other hand, insert a half-hearted passage stating that any contention that findings are ever necessary in Fourth Section proceedings is negated by the Administrative Pro-

¹ 49 U.S.C. §§ 1, 2, 3.

² 49 U.S.C. §§ 13, 15.

cedure Act. In this, the railroads find themselves in disagreement with the position the Commission takes just now. More important, they ignore altogether such cases as *Panama Refining Company v. Ryan*, 293 U. S. 388 (1935) and *Alabama Great Southern Ry. v. United States*, 340 U. S. 388 (1950) which hold that such findings are necessary on grounds that have nothing to do with the Administrative Procedure Act.

Both the government and the railroads insist that a hearing is not necessary. Here again their positions are no longer identical. They are alike, however, in the respect that their statements of questions presented both treat this case as involving all kinds of Fourth Section proceedings (Govt. Br. p. 2 and Rr. Br. p. 2) rather than the limited group of protested Fourth Section applications, described in the complaint of these regulated water carriers, as to whom Congress gave the Commission "not only the power, but the duty, to protect and foster" by the Transportation Act of 1940. Thereby appellees attempt to push forward very broad questions that are not here for decision, and which obscure the narrower issues that arise on this complaint. Apparently this is done in order to make selective references to a Congressional history which, if apposite at all, is so only when its more complete statement discloses that during the half century since Congress used the word "investigation" in Section 4 the Commission has given Congress to understand that it applied "investigation" to mean that whenever a proper party protested or asked for a hearing, he got one.³ If Congressional history is ever apposite to constitutional questions of due process that are raised here (R. 63) which the government does not face, it must be to show

³ 86 Cong. Rec. 10172.

⁴ 65 Cong. Rec. 8880, 8881.

that Congress intended its language to be understood in a sense that has constitutional validity.* *In particular, there has been no statement to Congress that when proper parties appeared and took issue on the facts alleged in a railroad application for an order to depart from the Fourth Section, the Commission followed the Alice-in-Wonderland practice of making its findings on the decisive, contested facts of that pending adversary proceeding first, and holding the hearing afterward.*

The railroads similarly make no attempt to distinguish these areas of Fourth Section activity, and treat the question of the lawfulness of these procedures when no one objects to the application, as being the same as the question of the lawfulness of the same procedures when protests are filed by proper parties and there is a pending, adversary proceeding on the decisive, contested issues of fact.

In the end, unlike the railroads, the government does not consistently ignore the more limited problem presented by this case of how properly and lawfully to deal with requests for hearings, on protests filed against Fourth Section applications by those competing regulated water carriers, the diversion of whose traffic to the rail-

* Since the Transportation Act of 1940 the Commission does not consider that exempt water carriers or private water carriers have any rights under any section of the Interstate Commerce Act. Cf. *James-McWilliams Blue Line v. U.S.*, 100 F. Supp. 66 (S.D. N.Y.); aff'd 342 U.S. 951. The question does not arise here. These appellants are regulated common carriers by water, certificated under the Transportation Act of 1940. (R. 2-3)

Some ninety per centum of Fourth Section proceedings are uncontested by anyone. See for example, 65 Cong. Rec. 8881; Hearings on S. 2327, before the Senate Interstate Commerce Committee, 68th Cong., 1st Sess., 464.

roads the applications are avowedly designed to accomplish. It does not, however, consider (1) the inequality of opportunity for the water-carriers to prepare protests (15 days) compared to the unlimited time available to the railroad applicants to prepare and amass selective, tendentious or disputed data in their applications; or (2) the disturbance of the status quo wrought by orders granted before hearing and in spite of protests; or (3) the irreversible injury to these appellant water carriers of the Commission's orders, entered without hearing, during the years that they customarily continue in force; or (4) that when contested issues of fact are presented to a federal tribunal on which it must make and state findings of fact that will be decisive of its direct determination of, and action on, the legal rights of the contending parties before it (to the immediate, continuing and irreversible, loss of one or the other of them) due process imperatively requires observance of the procedures that judicial experience has traditionally established as essential to a fair opportunity to be heard. Yet the government rests its support of orders based on incomplete investigation by the Commission on a citation of the language of Mr. Justice Brandeis in the *New England Divisions* case,* in which this Court reviewed an order which was entered only after extensive formal hearings and which specifically provided a means of complete escape from any injurious application in any individual instance.

The last point receives the most attention in what follows, because of its importance to these appellants (and, indeed, to the transportation industry).

* 261 U.S. 184, 200 (1923).

We readily agree with the government that this Court has jurisdiction to review the lower court's determination. (Br. 17) We note that the government agrees with us that the issues, if not found to be moot, are of public importance warranting decision by this Court in this proceeding (Br. 16).

I. THIS CONTROVERSY IS JUSTICIABLE.

In the first section of their respective briefs both the government and the railroads have continued their insistence that F.S.O. 19059 no longer has any effect and that therefore no controversy exists between the parties as to which either injunctive or declaratory relief can be given. The case presented here is one of recurring injury to appellants from the Commission's continuing practice, of which the orders here under attack are an instance. Appellees still rely, as they did in their Motion to Affirm, upon cases in which no such continuing practice or recurring injury was alleged. In most of these cases the parties had by mutual agreement settled their dispute or a change in circumstances beyond their control had removed the area of dispute. None of appellees' citations presents the different situation described in the complaint; or the situation in which the defendants alone have attempted under the pressure of the litigation to remove the immediate area of dispute—as they had done before in other like situations when the legality of their practices was brought under legal attack, only to continue the challenged practices after the court's hand was no longer on their shoulder.

The lower court held that federal judicial power to give relief did not exist (R. 64). The Commission asks for outright affirmance (Br. 18).

Judicial power extends to cases and controversies (Const. Art. III). The railroads ignore the averments of

recurrent injury from continuing unlawful practice of which these orders, whose review we seek, are instances.

The Commission argues that federal judicial power lapses unless *exactly* the same unlawful act can be repeated, and that in this context this means entering exactly the same unlawful order "except for the expiration dates". If that were the landmark of judicial power, exactly the same unlawful order can be entered again here, "except for the dates" (*Vide supra* p. 3). The considerations that are regarded in applying the doctrine of retained jurisdiction, however, are enumerated in our brief at pages 20-22. The appellees ignore them.

Certainly it could not be said (for example) that the Secretary of Agriculture's annual orders fixing sugar quotas would be exactly the same each year. It was enough in *Gay Union Corporation v. Wallace*, 112 F.2d 192 (D.C. Cir., 1940), *cert. den.*, 310 U.S. 647, that the *practice* of the Secretary in fixing the quotas might be repeated from year to year in the absence of effective court review. Unless effective judicial review is obtained, the Commission will continue its practice of entering temporary fourth section orders without giving any hearing to regulated water carriers in a competing mode of transportation, to whose injury the railroads' fourth section applications are avowedly directed.

Before the lower court, the government and the railroads insisted in their respective answers upon the entire lawfulness, in every respect, of the practice employed in entering these orders. That included both the practice of entering such orders without findings, and the admittedly continuing practice of entering such orders allowing such injury to be

immediately inflicted without hearing—the hearing that the Commission contemporaneously ordered of the very issues upon which the order, already made, entirely depended. The holding below was that federal judicial power did not extend to the case in *that attitude* (R. 64-65). Yet clearly the controversy between the parties as to the propriety both of the Commission's continuing practice and of this particular order, continues. Such a controversy lies within the power of the judiciary. *Public Utilities Commission of California*, 355 U. S. 534 (1958), *reh. den.*, 356 U. S. 925; *Carpenters' Union v. National Labor Relations Board*, 341 U. S. 707 (1951).

The Commission argues (Br. 34) that because it admits here the invalidity of this order for one reason, it is "unnecessary for the court to consider the other two grounds on which appellants attack it"—*viz.*, attack the order.

"The *questions* involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission *without a chance of redress.*" (Our emphasis.)'

The government makes its above suggestion (that it is "unnecessary for the court to consider" two of the grounds upon which the Commission's practice in entering this order and other like orders is challenged) in support of its argument that the Commission can enter such order *without hearings* (Br. 34). This seems inconsistent with

⁷ *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 515 (1911).

the government's statement that: "In this case, however, the substantive questions *** are of general importance and warrant decision by this court." (Br. 16). It is apparent that with respect to the illegality of its admitted practice in entering these orders without hearings the controversy continues.

The Commission (not the railroads) admit only in an appellate brief the illegality of the entering of these orders without findings. Where illegal acts of private individuals are legally challenged and they are discontinued pending litigation with promise of reform, the question of the likelihood of recurrence, in the absence of some binding determination, receives attention. Private individuals can speak for themselves. Government agencies, however, cannot speak for their successors, or even predict their views, with respect to important questions of their public duty. Even this very order has not been set aside by the Commission.

The government's admission on brief of the invalidity of the order leaves it standing. And despite the government's confession in its brief of the invalidity of F.S.O. 19059, the railroads have not made any such acknowledgment.

In any future damage action by appellants against the railroads the government would, of course, not be a party. Unless F.S.O. 19059 is now voided, the position of the railroads makes it clear that in a damage action against them they will defend the order vigorously, and that their defenses will include both the doctrine of collateral attack as set forth on page 24 of appellants' opening brief, and the validity of F.S.O. 19059 itself. As was stated in the *Southern Pacific Terminal* case, it is not necessary to define the extent to which the Commission's

order may be the basis for further proceedings.* The fact that it may be is sufficient reason for the Court to retain jurisdiction.*

No attempt has been made in either brief to show why Section 10(b) of the Administrative Procedure Act does not provide for declaratory relief in this case. Both the government and the railroads apparently contend only that if injunctive relief is *not available*, neither is declaratory relief. As a corollary, if injunctive relief is available, then declaratory relief is also available to supplement injunctive relief wherever it is inadequate. As shown on pages 25-27 of appellants' opening brief this case does present an occasion to use declaratory relief as that useful supplement to the statutory review which is contemplated by Section 10(b) of the Administrative Procedure Act.

II. APPELLANTS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES.

On pages 11-13 of their brief the railroads seek to change the character of appellants' complaint from one assailing the validity of F.S.O. 19059 to one protesting the Commission's failure to suspend the rates violating Section 4. The railroads insist that it was the Commission's failure to suspend the departure rates rather than its entry of the fourth section authorization which damaged appellants. The fact is, however, that the fourth section authorization causes the damage. Without it the railroads cannot lawfully effectuate the departure rates. Without the authorization they must either withdraw

* 219 U.S. at 515.

* The government also suggests in its brief (p. 29) that hitherto damages have not been sought by one carrier against another. (Cf. Section 8 of the Interstate Commerce Act.) That does not mean that they will not be.

their departure rates or else be subject to penalties and damages for violation of the law.

Section 4 was in substantial part designed specifically for the protection of water carriers. *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 567-568 (1919). The Commission for many years recognized that the intention to divert water traffic to railroads by use of rates violating Section 4 gave affected water carriers an interest in applications for fourth section authorization. It accordingly considered the effect of the requested authorization upon competing water carriers as one of the principal determinants whether the requested relief should be granted in whole or in part. *Transcontinental Cases*, 74 I.C.C. 48, 71 (1922); *Citrus Fruit from Florida to North Atlantic Ports*, 266 I.C.C. 627, 636-638 (1946); *Pacific Coast Fourth Section Applications*, 264 I.C.C. 36, 39 (1945). The requirement in the National Transportation Policy¹⁰ that *all* sections of the Interstate Commerce Act "shall" be construed to give effect to that policy surely has reiterated, in mandatory terms, the necessity for recognizing the interest of competing water carriers, including their interest in the procedures the Commission in authorizing the notoriously destructive form of rail competition to which Section 4 is addressed.

The railroads proceed from their fallacious premise to a fallacious conclusion that appellants' proper remedy is a complaint to the Commission under Sections 13 or 15 of the Act. But meantime the Commission has entered a binding order, not susceptible of collateral attack, authorizing the rates. The complaint before the Commission, they say, should allege the departure rates to be unreasonable or discriminatory as to the appellants. For this proposition they cite one sentence in *United States*

¹⁰ 54 Stat. 899, 49 U.S.C. Note preceding Section 1.

v. *Merchants & Manufacturers Trafic Association of Sacramento*, 242 U.S. 178 (1916).¹¹ The fact is that in the proceeding now before this Court, appellants are complaining about the unlawful manner in which the Commission entered F.S.O. 19059. Section 4 of the statute has already passed upon the character of the rates, making them unlawful in the absence of Commission authorization. No further proceeding before the Commission, or anywhere else except this Court, now is available to appellants to review the Commission's method of entering F.S.O. 19059. Any proceeding for such purpose except this one, whether before the Commission or any other tribunal, would be dismissed as a collateral attack or as an attempt twice to litigate the same matter.

In *Skinner & Eddy Corp. v. United States*, *supra*, Justice Brandeis, who also wrote the opinion in the *Sacramento Case*, pointed out this fundamental distinction between review of Fourth Section orders and complaints under Sections 13 and 15 about the unreasonableness and discrimination of particular rates as applied to the complainants:

"The defendants contend that the District Court did not have jurisdiction of the subject matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under §§13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceeding before the Commission [citing cases]; and the finding thereon would have been conclusive, unless there was

¹¹ This case is also known as *The Sacramento Case*. See *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 559 (1919).

lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law [citing cases]. But plaintiff does not contend that 75 cents is an unreasonably high rate or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. [citing cases] *The Sacramento Case, supra*, was a case of this character."

In *The Sacramento Case* (or *United States v. Merchants & Manufacturers Traffic Ass'n*) this Court did review the validity of the Fourth Section order involved, even though it refused to pass upon the reasonableness of the rates as applied to that particular association. If the association had presented the question of the reasonableness of the rates to the Commission during the Commission's hearings on the Fourth Section application, even this question might have been open on the judicial review of the order. The association had, however, not participated in the hearing, intervening before the Commission for the first time to present a petition for reconsideration of the Commission orders.

III. F.S.O. 19059 IS VOID FOR LACK OF FINDINGS.

It does not appear necessary to labor this point. The government concedes that the lack of findings in the order renders it invalid (Br. pp. 32-33). The railroads halfheartedly say (Br. p. 20) that findings are not required in Fourth Section orders by Section 8(b) of the Administrative Procedure Act. Clearly in investigations by the Commission findings are required (*Alabama Great Southern Ry. v. United States*, 340 U.S. 216, 228 (1950)

and to meet the constitutional requirement that the Commission show it has exercised its delegated powers within its statutory authority (*Panama Refining Company v. Ryan*, 293 U.S. 388, 433 (1935)).

It is necessary that this Court confirm the government's concession. Affirmance of the order of the court below would in all likelihood be construed as negating the necessity for such a concession since it was not made before that court.

IV. APPELLANTS WERE ENTITLED TO A HEARING BEFORE THEY WERE INJURED BY GRANT OF ANY FOURTH SECTION AUTHORIZATION TO THE RAILROADS.

Both the government and the railroads have stated the problem presented here as though it involved *all* kinds of Fourth Section orders entered by the Commission (Gov't Br., p. 2 Second Question Presented; Rr. Br., p. 2, Third Question Presented). The issue is narrower than they say. The complaint prays for relief only with respect to the kind of case presented here, *viz.*, an application avowedly designed to divert traffic from competing regulated water carriers who have duly and timely protested the application, requested a hearing, and presented issues which the Commission obviously found merited hearing since it ordered a hearing to be held in the Fourth Section proceeding as well as ordering an investigation into other matters affecting the rates.

By thus expanding the scope of the complaint the railroads, and to a lesser extent the government, rest their defense on the use of the word "investigation" in Section 4 and "hearing" in certain other sections of the Act. From this they deduce that "investigation" and "hearing" have mutually exclusive meanings, and that Congress, there-

fore, could not have intended hearings to be required prior to the entry of any Fourth Section orders whatever. The government cites an extensive legislative history that indicates that Congress has not in recent years intended to require hearings before entry of all Fourth Section orders.

These arguments change the issue and miss the point. Appellants do not contend that the investigation required in Section 4 must include a hearing in all cases, but that investigation does not exclude a hearing in all cases and that this and similar cases involve circumstances requiring a hearing, both by statutory intent and the Constitutional standard of due process. In this case we are dealing only with a particular kind of Fourth Section proceeding, and here the congressional history indicates that the intention was to require a hearing.

Both the government and the railroads rely heavily on the failure of Congress to enact the Gooding Bill¹² in 1924 after the Commission had reported to congress that it had entered temporary authority orders (Gov't. Br. pp. 36-38, Rr. Br. p. 17). The fact is, however, that nowhere in the Commission's Report¹³ nor in the testimony of Commissioners Hall and Campbell before the Senate Committee did the Commission report that temporary, or any other, authority was being granted *over protest* without a hearing.

Indeed, precisely the opposite impression was created. In Chairman Hall's letter¹⁴ to the Committee stating the

¹² S. 2327, 68th Cong., 1st Sess.

¹³ *Administration of Section 4 of the Interstate Commerce Act*, 87 I.C.C. 564 (1924).

¹⁴ Hearing on S. 2327 Before the Senate Committee on Interstate Commerce, 68th Cong., 1st Sess., 875 et seq., and particularly pp. 876-877; 65 Cong. Rec. 8880-8885, and particularly 8880-8881.

Commission's views on the bill, he pointed out that the Commission received many different kinds of Fourth Section applications, and that there was little interest by anyone other than the applicants in the vast majority of the applications. At hearings held on 209 original applications in 1923, outside interests filed only 31 appearances, and shippers' witnesses testified at only eight, only 2 of whom opposed the applications. Thus the uniform requirement of a hearing in so many cases in which there was no outside interest would require time and expense better devoted to other matters. Temporary authorities had been restricted to minor variations in tariffs filed prior to February 17, 1911 and protected by the grandfather proviso in Section 4, as it had been amended in 1910.¹⁴⁴ Moreover, he assured the Committee:

“The Commission has never denied a hearing on a fourth section application when hearing was sought by any party interested.”
* * *

“It may be added that no fourth-section relief has ever been granted in respect to transcontinental rates, and the rate relation of intermountain points to Pacific coast terminals, except upon hearing.”¹⁴⁵

¹⁴⁴ The Mann-Elkins inserted this proviso into Section 4:

“Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.” 36 Stat. 548.

¹⁴⁵ 65 Cong. Rec. 8880.

¹⁴⁶ Id. at 8881.

These same assurances were substantially repeated in his direct testimony to the Committee.¹⁷

Thus with respect to the important questions of that time involving Fourth Section rates, the Commission assured the Committee that no relief was ever granted without a hearing and that hearings were always held whenever requested.

The Senate Committee's Report on the Gooding Bill stated:¹⁸

"the commission was authorized to grant relief in special cases after investigation (meaning, of course, a public hearing)."

The failure to enact the Gooding Bill is attributable in large measure to the assurances by the Commission that it would hold hearings in the circumstances it described. If there was legislative approval of Commission practice, it was of this practice of granting hearings in such cases even though it did not always do so on unprotested applications.

The Monograph on the Interstate Commerce Committee by the Attorney General's Committee on Administrative Procedure¹⁹ refers at page 47 to the practice of entering temporary Fourth Section orders and states that hearings usually are not held, although in some instances hearings may be held on the question whether or not temporary relief should be granted for a specified period. It acknowledges the filing of protests in some cases, but does not state whether or not temporary relief is granted without hearing after filing of a protest. Hearings frequently were

¹⁷ Hearing on S. 2327 Before the Senate Committee on Interstate Commerce, 68th Cong., 1st Sess., pp. 462-467, 487.

¹⁸ S. Rep. No. 302, 68th Cong., 1st Sess., p. 5.

¹⁹ S. Doc. No. 10, Part 11, 77th Cong., 1st Sess.

held on applications for continuing relief even though no hearings was requested, and hearings always were held when requested. Six kinds of cases in which the Commission's Fourth Section Board was authorized to grant temporary relief in the name of Division 2 were enumerated in a Note on that same page. None even remotely resembles the situation presented by appellants' complaint. A similar report was made in 1944, and was no more explicit.²⁰ Indeed, from the fact that, in the 18 cases in which temporary relief was granted and "final" order entered after hearing, argument was held in only one case (obviously not a protested one, but one in which the Commission itself had required additional information), the obvious inference being that no protestants participated in any of these 18 proceedings. From the lack of any case law on this question until *Dixie Carriers v. United States*, 143 F. Supp. 844 (S.D. Tex., 1956) it may fairly be deduced that the Commission did not, over the protests of competing regulated water carriers, grant "temporary" relief without hearing and without completing the investigation it found necessary, much before 1954.

Even in 1960 Commissioner Winchell's testimony on S. 1881 referred only to the necessity to protect existing railroad traffic against diversion to other modes of transportation, stressing the competition of private and unregulated carriers.²¹ This testimony has no relevance to

²⁰ H. Doc. No. 678, 78th Cong., 2nd Sess., pp. 186-189.

²¹ Hearings on The Decline In The Position of the Coastwise and Intercoastal Shipping Industry of the United States Before the Merchant Marine and Fisheries Subcommittee, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2nd Sess., p. 568.

the situation presented in this case, for here the traffic sought in the railroads' Fourth Section application was traffic which regulated water carriers had serviced for some years.

Meanwhile it had become clear that the railroads were using rates violating Section 4 largely as a competitive weapon against water transportation. In 1938 Commissioner Eastman pointed out in his testimony that the railroads could effectively use such rates only to compete with water carriers and to a very limited extent with truckers.²² With the enactment of the Transportation Act of 1940²³ subjecting inland waterways carriers to regulation by the Commission, and at the same time subjecting the Commission to the congressional mandate in the National Transportation Policy that all sections of the Interstate Commerce Act must be construed in accordance with it, the original predominant purpose of Section 4 to protect water carriers from destructive competition of the railroads was heavily emphasized. A main concern of Congress in enacting the 1940 legislation, subjecting the inland waterway carriers to Commission regulation, was that sufficient safeguards be provided for the water carriers against railroad competition, so that they might not be invidiously treated by the Commission. See *Interstate Commerce Commission v. Mechling*, 330 U. S. 567, 574-576 (1947).

The competition of the railroads with water carriers by means of rates that are unlawful without the commission's Fourth Section authorization has intensified since that time. The struggle of the water carriers to survive

²² Hearings on S. 1356 and H.R. 1668 Before the Senate Interstate Commerce Committee, 75th Cong., 3rd Sess., 781-782.

²³ 54 Stat. 898.

against this form of competition has become the most important aspect of the administration of Section 4. (Cf. R. 59; and Appellant's Brief, 33-35) Thus in recent years the reported appeals from the commission's Fourth Section orders have been taken by water carriers, as may be seen from citations in the various briefs filed in this proceeding. A Senate Subcommittee has found it necessary to hold hearings on the decline of the coastwise and intercoastal shipping industry. The Commission itself recognizes the decline in this and other segments of the water-carrier industry. 74th Ann. Rep., I.C.C., 1960, p. 180. Thus this case involves the most important problems of the day in the administration of Section 4, the type of problem as to which the Commission in 1924 assured Congress would invariably be made the subject of hearing prior to grant of any relief.

The government cites (Br. pp. 38-41) the legislation since 1938 permitting Fourth Section relief specifically authorized by the Commission to become effective without requiring the usual thirty days' notice specified in Section 6²⁴ and exempting Fourth Section departures based on circuity from the necessity of prior Commission authorization.²⁵ These particular changes are not relevant to the question whether the Commission should hold hearings and complete the investigation it finds necessary to its complete information before authorizing Fourth Section relief that is protested by regulated water carriers, whose traffic is to be the prey of the authority granted.

Nothing in the congressional history appears to diminish the reliance which Congress placed in 1924 on the Commission's assurance that hearings were held whenever

²⁴ 54 Stat. 904.

²⁵ 71 Stat. 292.

requested by proper parties and that in the important cases of the day hearings would always be held, whether requested or not, before any relief was granted. In view of this, there can be but little doubt that it has been the congressional intent since 1910 that at least in such cases as this the Commission shall include a hearing in its investigation and do so before it disturbs the status quo.

A further reason for rejecting the Commission's construction of Section 4 is the substantial question of constitutionality raised by its construction, disclosed by the lack of fair play in its procedure, which it says Congress intended) in entering these so called temporary orders. The failure of this procedure to satisfy constitutionality requirements of due process is discussed below. For now it is sufficient to note the well-settled doctrine that when two constructions of a statute are possible, one of which raises grave constitutional questions, the construction avoiding such questions will be preferred. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 30 (1937).

The government (Br. 43-46) and the railroads (Br. 18-20) both contend that the Commission may enter an order called "temporary" (which stands for years) in circumstances such as this case presents, on the basis of only such investigation as it sees fit to give, without completing the investigation it finds to be necessary and which Section 4 requires.

The railroads rely on Section 4's grant of authority to the Commission to enter such orders "from time to time," citing *Skinner & Eddy Corp. v. United States, supra*. In that case, however, the court was discussing the modifications that might be required by changed conditions such as slides into the Panama Canal and the outbreak of a

World War. The court was not upholding a grant of authority entered before the investigation required by the statute was completed.

The government relies on *Community Broadcasting Co. v. Federal Communications Commission*, 274 F.2d 753 (D.C. Cir., 1960) and *The New England Divisions Case*, 261 U.S. 184 (1923). In the first a grant without hearing of a conditional license to operate a television station pending holding of a comparative hearing was set aside because a good-faith protest against the grant had been filed by another applicant also capable of operating such a station. The court strongly recommended to the Commission that it adhere to its own rules limiting grant of conditional licenses. These rules did not permit such a grant when more than one bona fide and valid application had been filed in the absence of necessity in the public interest for prompt establishment of service in a particular community, or of jeopardy arising from non-user, to the right of the United States under international agreements to retain the frequency under consideration. Thus this case appears to support appellants' contention that when they are rendering the required service and protest the railroads' attempt to divert their traffic, requesting a hearing, the Commission must complete its investigation before it can disturb the status quo by entering an order granting Fourth Section relief.

In *The New England Divisions Case*, the Commission's order under review was entered only after extensive hearings and laid down only a general guide on divisions. It had no immediate effect upon anyone who asked for further hearing. The application of that guide to particular rates and railroads was left to be worked out by the railroads and submitted to the Commission for approval, at

which time the parties were also to be permitted to show, if they chose, why the general guide should be modified as applied to them. *New England Divisions*, 66 I.C.C. 196, 206-207 (1922). In his concurring opinion Commissioner Potter specifically pointed out: "We can protect any particular carrier who brings to our attention a situation where the application of this method works hardship." 66 I.C.C. 196, 208 (1922). Justice Brandeis also pointed out that "serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing" 261 U.S. at 199. There was, of course, no saving clause in F.S.O. 19059 or in like "temporary" orders. If these orders are allowed to stand, they work irremediable injury upon appellants during the two-to-three year period required for the Commission to complete the investigation and enter a further order. Such a procedure clearly does not contain the safeguards which Justice Brandeis sought and found in *The New England Divisions Case*.

Finally the railroads challenge the constitutional necessity for a hearing in these circumstances, citing *Ewing v. Mytinger & Casselberry*, 339 U.S. 599 (1950); *Stoehr v. Wallace*, 255 U.S. 239 (1921) and *North American Cold Storage Company v. City of Chicago*, 211 U.S. 306 (1908). These cases are unanimous in holding that a hearing must be available in some proceeding which will give adequate remedy to the person injured by government action. Thus in the *Ewing* case the Food & Drug Administrator could determine without hearing only whether probable cause for instituting suit against the defendants existed, and defendants were entitled to a hearing before final determination would be made as to whether labeling of their product

violated the Act. In the *Stoehr* case if any person not an enemy instituted suit to show that the property in fact belonged to him, the Alien Property Custodian was required to retain the property seized pending disposition of the suit. Thus, in a war emergency measure such as the Trading With the Enemy Act, care was exercised to see that no final disposition of seized property was made until after non-enemies had had full opportunity for hearing. Similarly in the *North American Cold Storage Company* case the court held that the storage company could sue for damages and get a hearing on whether the food seized was unwholesome or not.

Appellants have no such opportunities for hearing and remedy open to them. When the "temporary" authority of the Commission is entered, the railroads for a period of years are enable to divert appellants' traffic and appellants can bring no action for damages suffered while the order is in effect. Direct appeal is not a satisfactory source of hearing since this would substitute the court for the Commission, contravening the doctrine of primary jurisdiction fostered by the Commission since *Texas & Pacific Railway Co. v. Abilene Cotton Oil Company*, 204 U.S. 426 (1906).

The government and the railroads assume that because the order is called "temporary" it cannot have any permanently injurious effect on appellant. The fact is, that the order is final for the period during which it is in effect. There is never any further determination by the Commission of the parties' rights for the period during which the order was in effect. No consideration of war, or protection of the public against deleterious foods, or frauds, is present to justify such a summary invasion of appellants' rights to their irreversible injury.

The extent to which the Fifth Amendment requires a hearing to be granted depends upon the specific factual context. This Court recently enunciated some of the pertinent considerations in *Hannah v. Larche*, 363 U.S. 420 (1960) at p. 442:

“* * * Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing type of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.”

In the instant case the Commission by its Fourth Section orders which it calls “temporary” makes “binding determinations which directly affect the legal rights of individuals” during the period the orders continue in effect. The affected rights of these appellants are their rights to protection granted in the National Transportation Policy against destructive competition which diverts

the traffic which has been their life's blood. This Court says that "it is imperative" that in such actions agencies use "procedures which have traditionally been associated with the judicial process." How far short of this mark the Commission has fallen in entering its order under the circumstances described in the complaint may be seen from the following pertinent facts.

The traffic which the railroads' Fourth Section application here involved was avowedly designed to capture traffic which for years these water carriers had moved by barge to Chicago. The railroads were free to take unlimited time to gather information and prepare their application, and in fact did require a substantial period of time. The water carriers were then allowed only fifteen days in which to get their protests on file in Washington. In their protests, the protestants raised issues of fact and indicated that with additional time supporting evidence could be produced showing that the rates did not comply with the statutory standards. They requested a hearing and they asked that no "temporary" authority be granted pending the hearing. The railroads were allowed yet another ten days to file replies, to which, under the Commissioner's rules, the protestants were not allowed to respond. Despite this vast disparity in the opportunity to present their showing to the Commission and the denial of any opportunity whatsoever to appellants to cross-examine and test the railroads' interested showing, the Commission forthwith entered an order, violently and immediately changing the status quo, and causing a sharp and irremediable loss of traffic to appellants for a substantial period of time. Finally the Commission's dilatory action in the subsequent proceedings during which time the injury continued, made it imperative that the appellants institute this suit. Fair play requires more in

any proceeding which so severely affects interested parties who are seeking to protect their rights.

Mistaken assumptions appear to be responsible for the Commission's suggestion that it is enough if only it should "make findings, showing that, to the degree necessary to justify temporary (*Sic.*) relief, the statutory criteria have been satisfied." (Br. 33) It is a mistake to assume that injury repeatedly inflicted upon these appellants and lasting for months and years is unimportant because it is always called "temporary". That assumption is contrary to the facts of life and it is contrary to the record (R. 59, 60; 54).

An administrative authority that has only one-sided advice on contested issues of fact upon whose outcome it is required by law to guide its action, has not made either the investigation intended by Congress, or required by the constitution, when it takes irreversibly injurious actions immediately affecting the rights of the contending parties, and changing the status quo, while it still—admittedly—needs a hearing to be fully informed upon the decisive facts that should have controlled its action.

CONCLUSION.

For the reasons stated herein, appellants respectfully request this Court to find it has jurisdiction over this appeal, reverse and vacate the order of three-judge District Court, enjoin, and declare the nullity of, the order and supplemental orders of the Interstate Commerce Commission entered under its Fourth Section Order Number 19059, and hold that on similar Fourth Section applications to

the Commission, the Commission cannot grant any Fourth Section relief without findings of fact sufficient to show compliance with the statutory prerequisites to grant of such relief or prior to holding a hearing when duly so requested by those competing regulated carriers using water transportation whose traffic the applications are designed to divert.

Respectfully submitted,

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